TEXAS REGISTER

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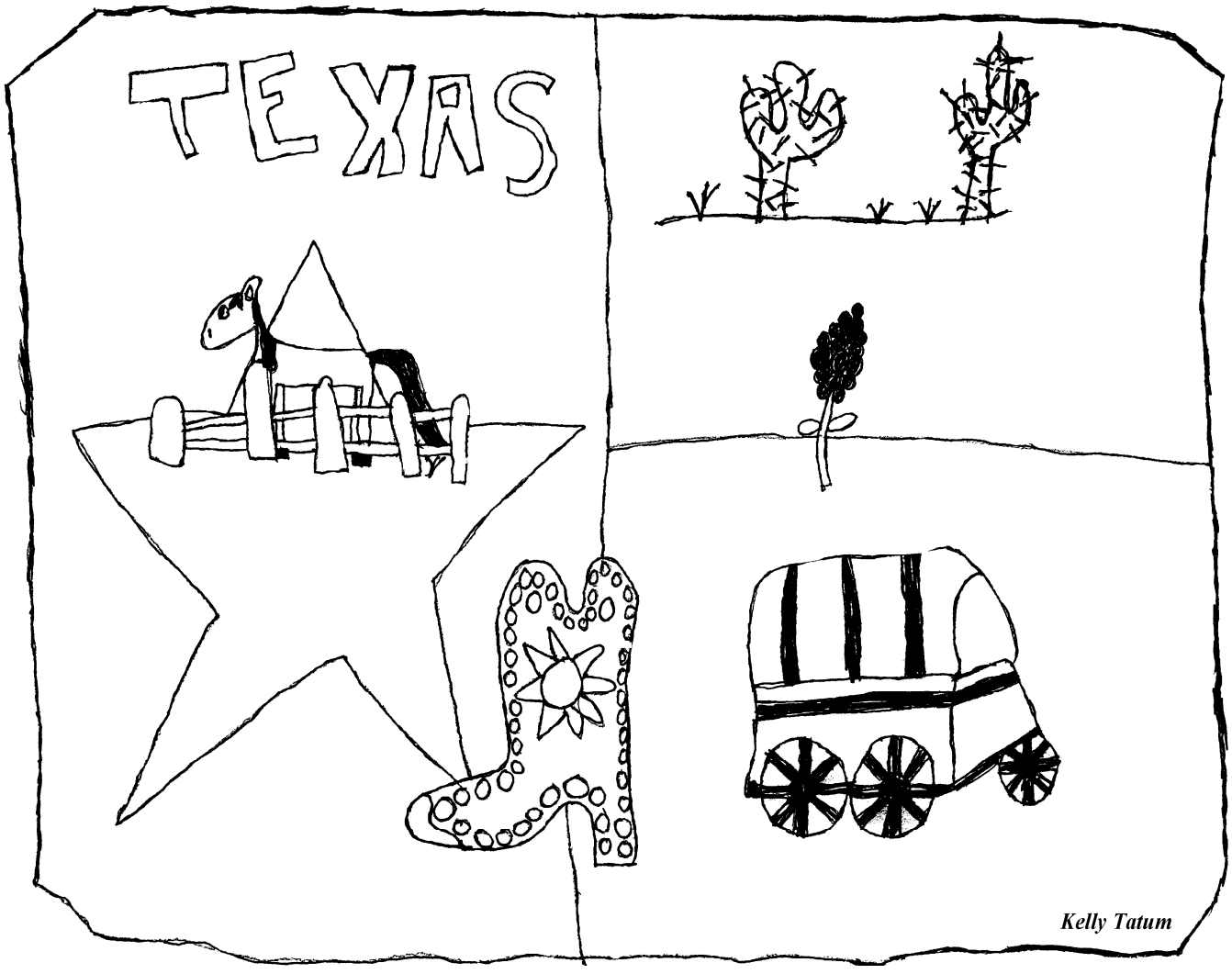

Kelly Tatum

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.state.tx.us/

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for August 27, 2009

Appointed to the rank of Brigadier General in Headquarters, Texas State Guard, Austin, Texas, pursuant to Government Code 431.055, with all rights, privileges and emoluments appertaining to this office, effective September 5, 2009, Colonel Charles A. Miller, Jr.

Appointed to the Health Disparities Task Force for a term to expire February 1, 2011, Ben G. Raimer of Galveston (replacing Darrell Sims of Fairview whose term expired). Dr. Raimer will serve as presiding officer of the task force.

Appointed to the Legislative Committee on Aging, pursuant to HB 610, 81st Legislature, Regular Session, effective September 1, 2009, for a term at the pleasure of the Governor, Homer W. Lear of San Antonio.

Appointed to the Legislative Committee on Aging, pursuant to HB 610, 81st Legislature, Regular Session, effective September 1, 2009, for a term at the pleasure of the Governor, Betty Lee Streckfuss of Spring.

Appointed to the Texas Department of Housing and Community Affairs for a term to expire January 31, 2013, Lowell A. Keig of Austin (replacing Tomas Cardenas of El Paso who resigned).

Appointments for August 31, 2009

Appointed as the Executive Commissioner of Health and Human Services, effective September 1, 2009, for a term to expire February 1, 2011, Thomas Michael Suehs of Austin (replacing Albert Hawkins of Austin whose term expired).

Appointed to the Department of Information Resources for a term to expire February 1, 2015, Richard S. Moore of Goliad (replacing Cliff Mountain of Austin whose term expired).

Appointed to the Texas Council on Autism and Pervasive Developmental Disorders for a term to expire February 1, 2010, Grover Glenn Roque-Jackson IV of Plano (replacing Michael Bernoski of Cedar Park who resigned).

Appointed to the Texas Animal Health Commission, effective September 6, 2009, for a term to expire September 6, 2015, Coleman H. Locke of Wharton (Mr. Locke is being reappointed).

Appointed to the Texas Animal Health Commission, effective September 6, 2009, for a term to expire September 6, 2015, Ralph Simmons of Tenaha (Mr. Simmons is being reappointed).

Appointed to the Texas Animal Health Commission, effective September 6, 2009, for a term to expire September 6, 2015, Beauregard White of Rosanky (replacing Rita Baca of El Paso whose term expired).

Designating William Purifoy as presiding officer of the Board of Dental Examiners for a term at the pleasure of the Governor. Dr. Purifoy is replacing Gary McDonald of Kingwood as presiding officer.

Designating Charles Bacarisse as presiding officer of the Department of Information Resources for a term at the pleasure of the Governor. Mr. Bacarisse is replacing Cliff Mountain of Austin as presiding officer.

Appointments for September 2, 2009

Appointed to the Western States Water Council for a term at the pleasure of the Governor, Thomas Weir Labatt, III of San Antonio (Mr. Labatt is being reappointed).

Appointed to the Western States Water Council for a term at the pleasure of the Governor, Carlos Rubinstein of Austin (replacing H. S. "Buddy" Garcia).

Appointed as alternate member to the Western States Water Council for a term at the pleasure of the Governor, Christopher D. DeCluitt of Waco (replacing David Montagne).

Appointed as alternate member to the Western States Water Council for a term at the pleasure of the Governor, John Elliott of Hunt (replacing Fred Pfeiffer).

Appointed as alternate member to the Western States Water Council for a term at the pleasure of the Governor, Senator Craig Estes of Wichita Falls (replacing Senator Buster Brown).

Appointed to the Texas State Affordable Housing Corporation Board of Directors for a term to expire February 1, 2011, Merrideth Jeran Akers of Plano (replacing Raymond Sanders of Austin who is deceased).

Appointed to the Sulphur River Basin Authority Board of Directors for a term to expire February 1, 2015, Borden E. Bell, Jr. of Texarkana (replacing Mike Kennedy of Texarkana whose term expired).

Appointed to the Sulphur River Basin Authority Board of Directors for a term to expire February 1, 2015, David T. Neeley of Mount Pleasant (replacing Jim Thompson of Atlanta whose term expired).

Appointed to the Texas Council on Alzheimer's Disease and Related Disorders for a term to expire August 31, 2015, Ronald DeVere of Austin (reappointed).

Appointed to the Texas Council on Alzheimer's Disease and Related Disorders for a term to expire August 31, 2015, Deborah S. Hanna of Austin (reappointed).

Appointed to the Interagency Council for Genetic Services for a term to expire September 1, 2011, Kyle M. Jones of Marble Falls (reappointed).

Appointed to the Interagency Council for Genetic Services for a term to expire September 1, 2011, Karen E. Littlejohn of Carrollton (reappointed).

Appointed to the Texas Emerging Technology Advisory Committee for a term to expire August 31, 2011, Tony Randall Cain of San Antonio (replacing Grant Billingsley of Midland whose term expired).

Appointed to the Texas Emerging Technology Advisory Committee for a term to expire August 31, 2011, Joel Fontenot of Dallas (replacing Kirk Calhoun of Tyler whose term expired).

Appointed to the Texas Emerging Technology Advisory Committee for a term to expire August 31, 2011, William J. Holmes of El Paso (Mr. Holmes is being reappointed).

Appointed to the Texas Emerging Technology Advisory Committee for a term to expire August 31, 2011, Scott J. Kennedy of Panhandle (replacing Gerald Cagle of Fort Worth whose term expire).

Appointed to the Texas Emerging Technology Advisory Committee for a term to expire August 31, 2011, William E. Morrow of Spring Branch (Mr. Morrow is being reappointed).

Appointed to the Texas Emerging Technology Advisory Committee for a term to expire August 31, 2011, John Schrock of McAllen (Mr. Schrock is being reappointed).

Appointed to the Texas Emerging Technology Advisory Committee for a term to expire August 31, 2011, William C. Sproull of Richardson (Mr. Sproull is being reappointed).

Appointed to the Texas Emerging Technology Advisory Committee for a term to expire August 31, 2011, Max W. Talbott of Austin (replacing Jack Gill of Houston whose term expired).

Appointed to the Texas Emerging Technology Advisory Committee for a term to expire August 31, 2011, Richard D. Williams of Richardson (replacing Madison Pedigo of Lucas whose term expired).

Appointed as Compact Commissioner to the Interstate Compact on Educational Opportunity for Military Children, pursuant to SB 90, 81st Legislature, Regular Session, for a term at the pleasure of the Governor, Robert P. Scott of Austin.

Appointed as Alternate Compact Commissioner to the Interstate Compact on Educational Opportunity for Military Children, pursuant to SB 90, 81st Legislature, Regular Session, for a term at the pleasure of the Governor, Brenda Kay Weber of Throckmorton.

Rick Perry, Governor

TRD-200903986

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Executive Order

RP 73

Relating to a comprehensive review of higher education cost efficiencies.

WHEREAS, students, parents and taxpayers must be assured of the greatest value for the investment they make in higher education; and

WHEREAS, Texas has made great progress in expanding higher education opportunities to more young Texans; and

WHEREAS, Texas' higher education funding system must continue to improve to keep pace with changes in the global economy and the modern marketplace; and

WHEREAS, the State of Texas is entrusted by the taxpayers to ensure that public institutions of higher education are operating efficiently; and

WHEREAS, while Texas public institutions of higher education are giving attention to containing costs, the state would benefit from a systematic and comprehensive effort to save taxpayer dollars while sustaining and improving quality; and

WHEREAS, the state budget for higher education has increased by $9.3 billion in the past decade, and institutions of higher education currently consume 12.4 percent of the state's budget;

NOW, THEREFORE, I, RICK PERRY, Governor of the State of Texas, by virtue of the power and authority vested in me by the Constitution and the laws of the State of Texas, do hereby issue the following order:

The Texas Higher Education Coordinating Board, in cooperation with Texas public institutions of higher education, shall undertake a broad and comprehensive review of system-wide opportunities for achieving cost efficiencies, including, but not limited to:

• state funding based on student course completion;

• restructuring the state's financial aid programs to improve administrative efficiencies and to provide financial aid to students who work hard to academically prepare for college;

• academic program consolidation and elimination of programs that produce relatively few graduates;

• faculty workload;

• articulation agreements between two-year and four-year institutions

• distance learning;

• alternatives to creating new campuses;

• course redesign to improve quality and reduce instructional costs for more courses;

• cooperative, cross-system contracting and purchasing;

• space utilization;

• energy use; and

• cost of instructional materials.

In addition, the Texas Higher Education Coordinating Board shall conduct a review of higher education cost efficiencies implemented in other states and other countries.

Based on the findings of this review, the Texas Higher Education Coordinating Board shall develop practices, policies and recommendations for cost-containment among public institutions of higher education in Texas and submit these practices and policies to the governor, the legislature and public institutions of higher education by November 1, 2010.

This executive order supersedes all previous orders on this matter that are in conflict or inconsistent with its terms, and this order shall remain in effect and in full force until it expires or it is modified, amended, rescinded or superseded by me or by a succeeding governor.

Given under my hand this the 9th day of September, 2009.

Rick Perry, Governor

TRD-200904051

♦ ♦ ♦

Proclamation 41-3228

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, the 81st Regular Session of the Texas Legislature convened in January of 2009 in accordance with Article III, Section 5 of the Texas Constitution and Section 301.001 of the Texas Government Code; and

WHEREAS, during that session, the legislature approved 8 joint resolutions proposing 11 constitutional amendments by a vote of two-thirds of all the members of each house, pursuant to Article XVII, Section 1 of the Texas Constitution; and

WHEREAS, pursuant to the terms of those resolutions and in accordance with the Texas Constitution, the legislature has set the date of the election for voting on the 11 proposed constitutional amendments to be November 3, 2009; and

WHEREAS, Section 3.003 of the Texas Election Code requires the election to be ordered by proclamation of the governor;

NOW, THEREFORE, I, RICK PERRY, GOVERNOR OF THE STATE OF TEXAS, by the authority vested in me by the Constitution and Statutes of the State of Texas, do hereby order a special election to be held throughout the State of Texas on the FIRST TUESDAY AFTER THE FIRST MONDAY IN NOVEMBER, the same being the THIRD day of NOVEMBER, 2009; and,

NOTICE THEREOF IS HEREBY GIVEN to the COUNTY JUDGE of each county, who is directed to cause said election to be held in the county on such date for the purpose of adopting or rejecting the 11 constitutional amendments proposed by 8 joint resolutions, as submitted by the 81st Legislature, Regular Session, of the State of Texas.

Pursuant to Sections 274.001 and 274.002 of the Texas Election Code, the propositions for the joint resolutions will appear as follows:

PROPOSITION 1

"The constitutional amendment authorizing the financing, including through tax increment financing, of the acquisition by municipalities and counties of buffer areas or open spaces adjacent to a military installation for the prevention of encroachment or for the construction of roadways, utilities, or other infrastructure to protect or promote the mission of the military installation."

PROPOSITION 2

"The constitutional amendment authorizing the legislature to provide for the ad valorem taxation of a residence homestead solely on the basis of the property's value as a residence homestead."

PROPOSITION 3

"The constitutional amendment providing for uniform standards and procedures for the appraisal of property for ad valorem tax purposes."

PROPOSITION 4

"The constitutional amendment establishing the national research university fund to enable emerging research universities in this state to achieve national prominence as major research universities, and transferring the balance of the higher education fund to the national research university fund."

PROPOSITION 5

"The constitutional amendment authorizing the legislature to authorize a single board of equalization for two or more adjoining appraisal entities that elect to provide for consolidated equalizations."

PROPOSITION 6

"The constitutional amendment authorizing the Veterans' Land Board to issue general obligation bonds in amounts equal to or less than amounts previously authorized."

PROPOSITION 7

"The constitutional amendment to allow an officer or enlisted member of the Texas State Guard or other state militia or military force to hold other civil offices."

PROPOSITION 8

"The constitutional amendment authorizing the state to contribute money, property, and other resources for the establishment, maintenance, and operation of veterans hospitals in this state."

PROPOSITION 9

"The constitutional amendment to protect the right of the public, individually and collectively, to access and use the public beaches bordering the seaward shore of the Gulf of Mexico."

PROPOSITION 10

"The constitutional amendment to provide that elected members of the governing boards of emergency services districts may serve terms not to exceed four years."

PROPOSITION 11

"The constitutional amendment to prohibit the taking, damaging, or destroying of private property for public use unless the action is for the ownership, use, and enjoyment of the property by the State, a political subdivision of the State, the public at large, or entities granted the power of eminent domain under law or for the elimination of urban blight on a particular parcel of property, but not for certain economic development or enhancement of tax revenue purposes, and to limit the legislature's authority to grant the power of eminent domain to an entity."

The secretary of state shall take notice of this proclamation and shall mail a copy of this order immediately to every county judge of this state, and all appropriate writs will be issued, and all proper proceedings will be followed, to the end that said election may be held and its result proclaimed in accordance with law.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 2nd day of September, 2009.

Rick Perry, Governor

Attested by: Esperanza "Hope" Andrade, Secretary of State

TRD-200904052

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THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Requests for Opinions

RQ-0818-GA

Requestor:

The Honorable Garnet F. Coleman

Chair, Committee on County Affairs

Texas House of Representatives

P.O. Box 2910

Austin, Texas 78768-2910

Re: Authority of a school district to access and use a county's right-of-way for the installation of fiber optic cable (RQ-0818-GA)

Briefs requested by October 9, 2009

RQ-0819-GA

Requestor:

The Honorable Vince Ryan

Harris County Attorney

1019 Congress, 15th Floor

Houston, Texas 77002

Re: Whether a district clerk may accept assignment of a defendant's cash bail bond refund in payment of the defendant's fines and costs (RQ-0819-GA)

Briefs requested by October 14, 2009

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200904059
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: September 15, 2009

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER B. UNDERWRITING, MARKET ANALYSIS, APPRAISAL, ENVIRONMENTAL SITE ASSESSMENT, PROPERTY CONDITION ASSESSMENT, AND RESERVE FOR REPLACEMENT RULES AND GUIDELINES

10 TAC §§1.31 - 1.37

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC Chapter 1, Subchapter B, §§1.31 - 1.37, concerning the Underwriting, Market Analysis, Appraisal, Environmental Site Assessment, Property Condition Assessment, and Reserve for Replacement Rules and Guidelines followed by the Real Estate Analysis Division. These repeals are proposed in order to consolidate and simplify the existing rules for all Real Estate Analysis.

Michael Gerber, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals.

Mr. Gerber has also determined that for each year of the first five-years the repeal is in effect the public benefit anticipated as a result of enforcing the repeals will be to permit the adoption of new rules to enhance the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

The public comment period will be held between September 18, 2009 to October 26, 2009 to receive input on this repeal and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2010 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 469-9606. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 26, 2009.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by this proposed repeal.

§1.31. General Provisions.

§1.32. Underwriting Rules and Guidelines.

§1.33. Market Analysis Rules and Guidelines.

§1.34. Appraisal Rules and Guidelines.

§1.35. Environmental Site Assessment Rules and Guidelines.

§1.36. Property Condition Assessment Guidelines.

§1.37. Reserve for Replacement Rules and Guidelines.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 11, 2009.

TRD-200904005
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 475-3916

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10 TAC §§1.31 - 1.37

The Texas Department of Housing and Community Affairs proposes new 10 TAC Chapter 1, Subchapter B, §§1.31 - 1.37, concerning the Underwriting, Market Analysis, Appraisal, Environmental Site Assessment, Property Condition Assessment and Reserve for Replacement Rules and Guidelines followed by the Real Estate Analysis Division. These new rules and guidelines are proposed in order to address guidelines for underwriting, market analysis, appraisal, environmental site assessment, and property condition assessment performed for requests submitted to the Department for review and the establishment of reserve for replacement and subsequent monitoring for developments funded through the Department.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections as proposed.

Mr. Gerber has also determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be the more efficient organization and use of Department resources as a result of providing separate processes for the disposition of Department assets and the assessment and collection of administrative penalties. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed.

The public comment period will be held between September 18, 2009 to October 26, 2009 to receive input on these sections and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2010 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 469-9606. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 26, 2009.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

The new sections affect no other code, article or statute.

§1.31. General Provisions.

(a) Purpose. The rules in this subchapter apply to the underwriting, market analysis, appraisal, environmental site assessment, property condition assessment, and reserve for replacement standards employed by the Texas Department of Housing and Community Affairs (the "Department" or "TDHCA"). This chapter provides rules for the underwriting review of an affordable housing development's financial feasibility and economic viability that ensures the most efficient allocation of resources while promoting and preserving the public interest in ensuring the long-term health of the Department's portfolio. In addition, this chapter guides the underwriting staff in making recommendations to the Executive Award and Review Advisory Committee (the "Committee"), Executive Director, and TDHCA Governing Board (the "Board") to help ensure procedural consistency in the determination of Development feasibility (§2306.0661(f) and §2306.6710(d), Texas Government Code). Due to the unique characteristics of each development the interpretation of the rules and guidelines described in this subchapter is subject to the discretion of the Department and final determination by the Board.

(b) Definitions. Terms used in this subchapter that are also defined in Chapter 50 of this title (the Department's Housing Tax Credit Program Qualified Allocation Plan and Rules, known as the "QAP") have the same meaning as in the QAP. Those terms that are not defined in the QAP or which may have another meaning when used in this subchapter, shall have the meanings set forth in §1.32(b) of this subchapter.

(1) Affordable Housing--Housing that has been funded through one or more of the Department's programs or other local, state or federal programs or has at least one unit that is restricted in the rent that can be charged either by a Land Use Restriction Agreement or other form of Deed Restriction.

(2) Bank Trustee--A bank authorized to do business in this state, with the power to act as trustee.

(3) Cash Flow--The funds available from operations after all expenses and debt service required to be paid has been considered.

(4) Credit Underwriting Analysis Report--Sometimes referred to as the "Report." A decision making tool used by the Department and Board containing a synopsis and reconciliation of the application information submitted by the Applicant.

(5) Comparable Unit--A Unit, when compared to the subject Unit, similar in overall condition, location, unit amenities, utility structure, and common amenities, and:

(A) for purposes of calculating the inclusive capture rate targets the same population and is likely to draw from the same demand pool;

(B) for purposes of estimating the Restricted Market Rent targets the same population and is similar in net rentable square footage and number of bedrooms; or

(C) for purposes of estimating the subject Unit market rent does not have any income or rent restrictions and is similar in net rentable square footage and number of bedrooms.

(6) Contract Rent--Maximum rent limits based upon current and executed rental assistance contract(s), typically with a federal, state or local governmental agency.

(7) DCR--Debt Coverage Ratio. Sometimes referred to as the "Debt Coverage" or "Debt Service Coverage." A measure of the number of times loan principal and interest are covered by Net Operating Income.

(8) Development--Sometimes referred to as the "Subject Development." Multi-unit residential housing that meets the affordability requirements for and requests or has received funds from one or more of the Department's sources of funds.

(9) EGI--Effective Gross Income. The sum total of all sources of anticipated or actual income for a rental Development less vacancy and collection loss, leasing concessions, and rental income from employee-occupied units that is not anticipated to be charged or collected.

(10) Eligible Hard Costs--Hard Costs includable in Eligible Basis for the purposes of determining a Housing Tax Credit Allocation.

(11) ESA--Environmental Site Assessment. An environmental report that conforms with the Standard Practice for Environmental Site Assessments. Phase I Assessment Process (ASTM Standard Designation. E 1527) and conducted in accordance with the Department's Environmental Site Assessment Rules and Guidelines in §1.35 of this subchapter as it relates to a specific Development.

(12) First Lien Lender--A lender whose lien has first priority.

(13) Gross Capture Rate--The Gross Capture Rate is defined as the Relevant Supply divided by the Gross Demand.

(14) Gross Demand--The sum of Potential Demand from the Primary Market (PMA), demand from other sources, and Potential Demand from a Secondary Market Area (SMA) to the extent that SMA demand does not exceed 25% of Gross Demand.

(15) Gross Program Rent--Sometimes called the "Program Rents." Maximum rent limits based upon the tables promulgated by the Department's division responsible for compliance which are developed by program and by county or Metropolitan Statistical Area ("MSA") or Primary Metropolitan Statistical Area ("PMSA") or national non-metro area.

(16) Hard Costs--The sum total of direct construction costs, site work costs, off-site costs and contingency.

(17) Market Analysis--Sometimes referred to as "Market Study." An evaluation of the economic conditions of supply, demand and rental rates or pricing conducted in accordance with the Department's Market Analysis Rules and Guidelines in §1.33 of this subchapter as it relates to a specific Development.

(18) Market Analyst--Any person who prepares a market study.

(19) Market Rent--The rent concluded by the Market Analyst for a particular unit type and size after adjustments are made to rents charged by owners of Comparable Units on properties without rent and income restrictions.

(20) NOI--Net Operating Income. The income remaining after all operating expenses, including replacement reserves and taxes have been paid.

(21) Potential Demand--The number of income-eligible, age-, size-, and tenure-appropriate target households in the designated market area at the proposed placement in service date.

(22) Primary Market--Sometimes referred to as "Primary Market Area" or "PMA." The area defined by the Qualified Market Analyst as described in §1.33(d)(8) of this subchapter from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(23) Property Condition Assessment--Sometimes referred to as "PCA," "Physical Needs Assessment," "Project Capital Needs Assessment," or "Property Condition Report." The PCA provides an evaluation of the physical condition of an existing property to evaluate the immediate cost to rehabilitate and to determine costs of future capital improvements to maintain the property. The PCA must be prepared in accordance with the Department's Property Condition Assessment Rules and Guidelines in §1.36 of this subchapter as it relates to a specific Development.

(24) Qualified Market Analyst--A real estate appraiser certified or licensed by the Texas Appraiser Licensing and Certification Board, a real estate consultant, or other professional currently active in the subject property's market area who demonstrates competency, expertise, and the ability to render a high quality written report. The individual's performance, experience, and educational background will provide the general basis for determining competency as a Market Analyst. Competency will be determined by the Department, in its sole discretion. The Qualified Market Analyst must be a Third Party.

(25) Relevant Supply--The relevant supply of proposed and unstabilized Comparable Units includes:

(A) The proposed subject Units;

(B) Comparable Units with priority over the subject, based on the Department's evaluation process described in §50.9(d)(5) of this title, that have made application to TDHCA and have not been presented to the TDHCA Board for decision; and

(C) Comparable Units in previously approved but Unstabilized Developments in the Primary Market Area (PMA); and

(D) Comparable Units in previously approved but Unstabilized Developments in the Secondary Market Area (SMA), in the same proportion as the proportion of Potential Demand from the SMA that is included in Gross Demand.

(26) Rent Over-Burdened Households--Non-elderly households paying more than 35% of gross income towards total housing expenses (unit rent plus utilities) and elderly households paying more than 50% of gross income towards total housing expenses.

(27) Reserve Account--An individual account.

(A) Created to fund any necessary repairs for a multifamily rental housing development; and

(B) Maintained by a First Lien Lender or Bank Trustee.

(28) Restricted Market Rent--The restricted rent concluded by the Qualified Market Analyst for a particular unit type and size after adjustments are made to rents charged by owners of Comparable Units on properties with the same rent and income restrictions.

(29) Secondary Market--Sometimes referred to as "Secondary Market Area." The area defined by the Qualified Market Analyst as described in §1.33(d)(7) of this subchapter.

(30) Sub-Market--An area defined by the Underwriter based on general overall market segmentation promulgated by market data tracking and reporting services from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(31) Supportive Housing--Residential Rental Developments intended for occupancy by individuals or households transitioning from homelessness, at risk of homelessness, or in need of specialized and specific social services.

(32) Sustaining Occupancy--Sometimes referred to as "Breakeven Occupancy." The occupancy level at which rental income plus secondary income is equal to all operating expenses, including replacement reserves and taxes, and mandatory debt service requirements for a Development.

(33) TDHCA Operating Expense Database--Sometimes referred to as "TDHCA Database." A consolidation of recent actual operating expense information collected through the Department's Annual Owner Financial Certification process, as required and described in Chapter 60, Subchapter A of this title, and published on the Department's web site.

(34) Underwriter--The author(s) of the Credit Underwriting Analysis Report.

(35) Unstabilized Development--A Development with Comparable Units that has been approved for funding by the TDHCA Board or is currently under construction or has not maintained a 90% occupancy level for at least twelve (12) consecutive months following construction completion.

(36) Utility Allowance--The estimate of tenant-paid utilities, based either on the most current HUD Form 52667, "Section 8, Existing Housing Allowance for Tenant-Furnished Utilities and Other Services," provided by the local entity responsible for administering the HUD Section 8 program with most direct jurisdiction over the majority of the buildings existing, a documented estimate from the utility provider proposed in the Application, or for an existing development an allowance calculated by the Department pursuant to §60.109 of this title. Documentation from the local utility provider to support an alternative calculation can be used to justify alternative Utility Allowance conclusions but must be specific to the subject development and consistent with the building plans provided.

(37) Work Out Development--A financially distressed Development seeking a change in the terms of Department funding or program restrictions based upon market changes.

(c) Appeals. Certain programs contain express appeal options. Where not indicated, §1.7 and §1.8 of this chapter include general ap-

peal procedures. In addition, the Department encourages the use of Alternative Dispute Resolution methods as outlined in §1.17 of this chapter.

§1.32. Underwriting Rules and Guidelines.

(a) General Provisions. The Department Governing Board has authorized the development of these rules under its authority under §2306.148, Texas Government Code. The rules provide a mechanism to produce consistent information in the form of a Credit Underwriting Analysis Report to provide interested parties information the Board relies upon in balancing the desire to assist as many Texans as possible by providing no more financing than necessary and have independent verification that Developments are economically feasible. The Report should consider all information timely provided by the Applicant. The Report generated in no way guarantees or purports to warrant the actual performance, feasibility, or viability of the Development by the Department.

(b) Report Contents. The Report provides an organized and consistent synopsis and reconciliation of the application information submitted by the Applicant. The Report will be based solely upon information that is provided in accordance with the time frames provided in the current QAP, Program Rules or Notice of Funds Availability as appropriate. The Report should also identify the number of revisions and date of most current revision to any information deemed to be relevant by the Underwriter.

(c) Recommendations in the Report. The conclusion of the Report includes a recommended award of funds or allocation of Housing Tax Credits based on the lesser amount calculated by the program limit method (if applicable), gap/DCR method, or the amount requested by the Applicant as further described in paragraphs (1) - (3) of this subsection, and states any feasibility conditions to be placed on the award.

(1) Program Limit Method. For Developments requesting Housing Tax Credits, this method is based upon calculation of Eligible Basis after applying all cost verification measures and program limits as described in this section. The Applicable Percentage used is as defined in the QAP. For Developments requesting funding through a Department program other than Housing Tax Credits, this method is based upon calculation of the funding limit based on current program rules at the time of underwriting.

(2) Gap/DCR Method. This method evaluates the amount of funds needed to fill the gap created by total development cost less total non-Department-sourced funds or Tax Credits. In making this determination, the Underwriter resizes any anticipated deferred developer fee down to zero before reducing the amount of Department funds or Tax Credits. In the case of Housing Tax Credits, the syndication proceeds needed to fill the gap in permanent funds are divided by the syndication rate to determine the amount of Tax Credits. In making this determination, the Department adjusts the permanent loan amount and/or any Department-sourced loans, as necessary, such that it conforms to the DCR standards described in this section.

(3) The Amount Requested. The amount of funds that is requested by the Applicant as reflected in the Application documentation.

(d) Operating Feasibility. The operating financial feasibility of Developments funded by the Department is tested by subtracting operating expenses, including replacement reserves and taxes, from EGI to determine Net Operating Income. This Net Operating Income is divided by the annual debt service to determine the Debt Coverage Ratio. The Underwriter characterizes a Development as infeasible from an operational standpoint when the Debt Coverage Ratio does not meet the minimum standard set forth in paragraph (4)(D) of this subsection. The Underwriter may choose to make adjustments to the financing structure, such as lowering the debt and increasing the deferred developer fee, which could result in a re-characterization of the Development as feasible based upon specific conditions set forth in the Report.

(1) Income. In determining the Year 1 proforma, the Underwriter evaluates the reasonableness of the Applicant's income estimate by determining the appropriate rental rate per unit based on contract, program and market factors. Miscellaneous income and vacancy and collection loss limits as set forth in subparagraphs (B) and (C) of this paragraph, respectively, are applied unless well-documented support is provided.

(A) Rental Income. The Underwriter will update the utility allowance and calculate the appropriate rent on a conservative or Contract Rent basis for comparison to the Applicant's estimate in the Application. The conservative basis for a restricted unit is the lesser of the Gross Program Rent less Utility Allowances ("Net Program Rent") or Restricted Market Rent. The conservative basis for an unrestricted unit is the lesser of the Market Rent or Applicant's projected rent where the Applicant's projected rent is reasonable to the Underwriter as supported by documentation of Comparable Units and as independently verified by the Underwriter. Where Contract Rents are included, they will be used regardless of the conservative basis derived rent.

(i) Market Rents. The Underwriter reviews the attribute adjustment matrix of Comparable Units by unit size provided by the Market Analyst and determines if the adjustments and conclusions made are reasoned and well documented. The Underwriter uses the Market Analyst's conclusion of adjusted Market Rent by unit, as long as the proposed Market Rent is reasonably justified and does not exceed the highest existing unadjusted market comparable rent. Random checks of the validity of the Market Rents may include direct contact with the comparable properties. The Market Analyst's attribute adjustment matrix should include, at a minimum, adjustments for location, size, amenities, and concessions as more fully described in §1.33 of this subchapter.

(ii) Restricted Market Rent. The Underwriter reviews the attribute adjustment matrix of Comparable Units by unit size and income and rent restrictions provided by the Market Analyst and determines if the adjustments and conclusions made are reasoned and well documented. The Underwriter uses the Market Analyst's conclusion of adjusted Restricted Market Rent by unit, as long as the proposed Restricted Market Rent is reasonably justified and does not exceed the highest existing unadjusted market comparable restricted rent. Random checks of the validity of the Restricted Market Rents may include direct contact with the comparable properties. The Market Analyst's attribute adjustment matrix should include, at a minimum, adjustments for location, size, amenities, and concessions as more fully described in §1.33 of this subchapter.

(iii) Gross Program Rents less Utility Allowance or Net Program Rents. The Underwriter reviews the Applicant's proposed rent schedule and determines if it is consistent with the representations made in the remainder of the Application. The Underwriter uses the Gross Program Rents as promulgated by the Department's division responsible for compliance for the year that is most current at the time the underwriting begins. When underwriting for a simultaneously funded competitive round, all of the Applications are underwritten with the rents promulgated for the same year. Gross Program Rents are reduced by the Utility Allowance. If Program Rents are adjusted by the Department after the close of the Application Acceptance Period but prior to publication of the Report, the Underwriter will adjust the Applicant's EGI to account for any increase or decrease in Program Rents for the purposes of determining the reasonableness of the Applicant's EGI.

(I) Units must be individually metered for all utility costs to be paid by the tenant.

(II) Gas utilities are verified on the building plans and elsewhere in the Application when applicable.

(III) Trash allowances paid by the tenant are rare and only considered when the building plans allow for individual exterior receptacles.

(IV) Refrigerator and range allowances are not considered part of the tenant-paid utilities unless the tenant is expected to provide their own appliances, and no eligible appliance costs are included in the development cost breakdown.

(iv) Contract Rents. The Underwriter reviews submitted rental assistance contracts to determine the Contract Rents currently applicable to the Development. Documentation supporting the likelihood of continued rental assistance is also reviewed. The underwriting analysis will take into consideration the Applicant's intent to request a Contract Rent increase. At the discretion of the Underwriter, the Applicant's proposed rents may be used in the underwriting analysis with the recommendations of the Report conditioned upon receipt of final approval of such increase.

(B) Miscellaneous Income. All ancillary fees and miscellaneous secondary income, including but not limited to late fees, storage fees, laundry income, interest on deposits, carport rent, washer and dryer rent, telecommunications fees, and other miscellaneous income, are anticipated to be included in a $5 to $20 per unit per month range. Exceptions may be made at the discretion of the Underwriter for garage income, pass-through utility payments, pass-through water, sewer and trash payments, cable fees, congregate care/assisted living/elderly facilities, and child care facilities.

(i) Exceptions must be justified by operating history of existing comparable properties within the PMA or SMA.

(ii) The Applicant must show that the tenant will not be required to pay the additional fee or charge as a condition of renting an apartment unit and must show that the tenant has a reasonable alternative.

(iii) The Applicant's operating expense schedule should reflect an offsetting cost associated with income derived from pass-through utility payments, pass-through water, sewer and trash payments, and cable fees.

(iv) Collection rates of exceptional fee items will generally be heavily discounted.

(v) If the total secondary income is over the maximum per unit per month limit, any cost associated with the construction, acquisition, or development of the hard assets needed to produce an additional fee may also need to be reduced from Eligible Basis for Tax Credit Developments as they may, in that case, be considered to be a commercial cost rather than an incidental to the housing cost of the Development.

(C) Vacancy and Collection Loss. The Underwriter uses a vacancy rate of 7.5% (5% vacancy plus 2.5% for collection loss) unless the Market Analysis reflects a higher or lower established vacancy rate for the area. Elderly and 100% project-based rental subsidy Developments and other well documented cases may be underwritten at a combined 5% at the discretion of the Underwriter if the historical performance reflected in the Market Analysis is consistently higher than a 95% occupancy rate.

(D) Effective Gross Income. The Underwriter independently calculates EGI. If the EGI figure provided by the Applicant is within 5% of the EGI figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR the Underwriter will maintain and use its independent calculation unless the Applicant's proforma meets the requirements of paragraph (3) of this subsection.

(2) Expenses. In determining the Year 1 proforma, the Underwriter evaluates the reasonableness of the Applicant's expense estimate by line item comparisons based upon the specifics of each transaction, including the type of Development, the size of the units, and the Applicant's expectations as reflected in their proforma. Historical stabilized certified or audited financial statements of the Development or Third Party quotes specific to the Development will reflect the strongest data points to predict future performance. The Department's database of properties in the same location or region as the proposed Development also provides heavily relied upon data points; the Department's database summary is available on the TDHCA website. Data from the Institute of Real Estate Management's (IREM) most recent Conventional Apartments-Income/Expense Analysis book for the proposed Development's property type and specific location or region may be referenced. In some cases local or project-specific data such as Public Housing Authority ("PHA") Utility Allowances and property tax rates are also given significant weight in determining the appropriate line item expense estimate. Estimates of utility savings from green building components, including on-site renewable energy, must be documented by experience of third parties not related to the contractor or component vendor. Finally, well documented information provided in the Market Analysis, the Application, and other sources may be considered.

(A) General and Administrative Expense. General and Administrative Expense includes all accounting fees, legal fees, advertising and marketing expenses, office operation, supplies, and equipment expenses. The underwriting tolerance level for this line item is 20%.

(B) Management Fee. Management Fee is paid to the property management company to oversee the effective operation of the property and is most often based upon a percentage of Effective Gross Income as documented in the management agreement contract. Typically, 5% of the Effective Gross Income is used, though higher percentages for rural transactions that are consistent with the TDHCA Database can be concluded. Percentages as low as 3% may be utilized if documented by a fully executed management contract agreement with an acceptable management company. The Underwriter will require documentation for any percentage difference from the 5% of the Effective Gross Income standard.

(C) Payroll and Payroll Expense. Payroll and Payroll Expense includes all direct staff payroll, insurance benefits, and payroll taxes including payroll expenses for repairs and maintenance typical of a conventional development. It does not, however, include direct security payroll or additional supportive services payroll. The underwriting tolerance level for this line item is 10%.

(D) Repairs and Maintenance Expense. Repairs and Maintenance Expense includes all repairs and maintenance contracts and supplies. It should not include extraordinary capitalized expenses that would result from major renovations. Direct payroll for repairs and maintenance activities are included in payroll expense. The underwriting tolerance level for this line item is 20%.

(E) Utilities Expense (Gas and Electric). Utilities Expense includes all gas and electric energy expenses paid by the owner. It includes any pass-through energy expense that is reflected in the EGI. The underwriting tolerance level for this line item is 30%.

(F) Water, Sewer and Trash Expense. Water, Sewer and Trash Expense includes all water, sewer and trash expenses paid by the owner. It would also include any pass-through water, sewer and trash expense that is reflected in the EGI. The underwriting tolerance level for this line item is 30%.

(G) Insurance Expense. Insurance Expense includes any insurance for the buildings, contents, and liability but not health or workman's compensation insurance. The underwriting tolerance level for this line item is 30%.

(H) Property Tax. Property Tax includes all real and personal property taxes but not payroll taxes. The underwriting tolerance level for this line item is 10%.

(i) The per unit assessed value will be calculated based on the capitalization rate published on the county taxing authority's website. If the county taxing authority does not publish a capitalization rate on the internet, a capitalization rate of 10% will be used or comparable assessed values may be used in evaluating this line item expense.

(ii) Property tax exemptions or "proposed payment in lieu of tax" agreement (PILOT) must be documented as being reasonably achievable if they are to be considered by the Underwriter. At the discretion of the Underwriter, a property tax exemption that meets known federal, state and local laws may be applied based on the tax-exempt status of the Development Owner and its Affiliates.

(I) Reserves. Reserves include annual reserve for replacements of future capitalizable expenses as well as any ongoing additional operating reserve requirements. The Underwriter includes minimum reserves of $250 per unit for new construction and $300 per unit for all other Developments. The Underwriter may require an amount above $300 for Developments other than new construction based on information provided in the PCA. The Applicant's expense for reserves may be adjusted by the Underwriter if the amount provided by the Applicant is insufficient to fund future capital needs as documented by the PCA. Higher levels of reserves also may be used if they are documented in the financing commitment letters.

(J) Other Expenses. The Underwriter will include other reasonable and documented expenses, not including depreciation, interest expense, lender or syndicator's asset management fees, or other ongoing partnership fees. Lender or syndicator's asset management fees or other ongoing partnership fees also are not considered in the Department's calculation of debt coverage. The most common other expenses are described in more detail in clauses (i) - (iv) of this subparagraph.

(i) Supportive Services Expense. Supportive Services Expense includes the documented cost to the owner of any non-traditional tenant benefit such as payroll for instruction or activities personnel. The Underwriter will not evaluate any selection points for this item. The Underwriter's verification will be limited to assuring any anticipated costs are included. For all transactions supportive services expenses are considered in calculating the Debt Coverage Ratio.

(ii) Security Expense. Security Expense includes contract or direct payroll expense for policing the premises of the Development. The Applicant's amount is typically accepted as provided. The Underwriter will require documentation of the need for security expenses that exceed 50% of the anticipated payroll expense estimate discussed in subparagraph (C) of this paragraph.

(iii) Compliance Fees. Compliance fees include only compliance fees charged by TDHCA. The Department's charge for a specific program may vary over time; however, the Underwriter uses the current charge per unit per year at the time of underwriting. For all transactions compliance fees are considered in calculating the Debt Coverage Ratio.

(iv) Cable Television Expense. Cable Television Expense includes fees charged directly to the owner of the Development to provide cable services to all units. The expense will be considered only if a contract for such services with terms is provided and income derived from cable television fees is included in the projected EGI. Cost of providing cable television in only the community building should be included in General and Administrative Expense as described in subparagraph (A) of this paragraph.

(K) The Department will communicate with and allow for clarification by the Applicant when the overall expense estimate is over 5% greater or less than the Underwriter's estimate. In such a case, the Underwriter will inform the Applicant of the line items that exceed the tolerance levels indicated in this paragraph, but may request additional documentation supporting some, none or all expense line items. If a rationale acceptable to the Underwriter for the difference is not provided, the discrepancy is documented in the Report and the justification provided by the Applicant and the countervailing evidence supporting the Underwriter's determination is noted. If the Applicant's total expense estimate is within 5% of the final total expense figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR the Underwriter will maintain and use its independent calculation unless the Applicant's Year 1 proforma meets the requirements of paragraph (3) of this subsection.

(3) Net Operating Income. NOI is the difference between the EGI and total operating expenses. If the Year 1 NOI figure provided by the Applicant is within 5% of the Year 1 NOI figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating the Year 1 DCR the Underwriter will maintain and use his independent calculation of NOI unless the Applicant's Year 1 EGI, Year 1 total expenses, and Year 1 NOI are each within 5% of the Underwriter's estimates.

(4) Debt Coverage Ratio. Debt Coverage Ratio is calculated by dividing Net Operating Income by the sum of loan principal and interest for all permanent sources of funds. Loan principal and interest, or "Debt Service," is calculated based on the terms indicated in the submitted commitments for financing. Terms generally include the amount of initial principal, the interest rate, amortization period, and repayment period. Unusual financing structures and their effect on Debt Service will also be taken into consideration.

(A) Interest Rate. The interest rate used should be the rate documented in the commitment letter. Commitments indicating a variable rate must provide a detailed breakdown of the component rates comprising the all-in rate. The commitment must also state the lender's underwriting interest rate, or the Applicant must submit a separate statement executed by the lender with an estimate of the interest rate as of the date of the statement. The Underwriter may challenge the interest rate based on data collected on similarly structured transactions.

(B) Amortization Period. The Department requires an amortization of not less than thirty (30) years and not more than forty (40) years (fifty (50) years for federally sourced loans), or an adjustment to the amortization structure is evaluated and recommended. In non-Tax Credit transactions a lesser amortization period may be used if the Department's funds are fully amortized over the same period.

(C) Repayment Period. For purposes of projecting the DCR over a 30-year period for Developments with permanent financing structures with balloon payments in less than thirty (30) years, the

Underwriter will carry forward Debt Service calculated based on a full amortization and the interest rate stated in the commitment.

(D) Acceptable Debt Coverage Ratio Range. The acceptable Year 1 DCR range for all priority or foreclosable lien financing plus the Department's proposed financing falls between a minimum of 1.15 to a maximum of 1.35. HOPE VI and USDA Rural Development transactions may underwrite to a DCR less than 1.15 or greater than 1.35 based upon documentation of acceptance from the lender.

(i) For Developments other than HOPE VI and USDA Rural Development transactions, if the DCR is less than the minimum, the recommendations of the Report are conditioned upon a reduced debt service and the Underwriter will make adjustments to the assumed financing structure in the order presented in subclauses (I) - (III) of this clause.

(I) A reduction of the interest rate or an increase in the amortization period for TDHCA funded loans;

(II) A reclassification of TDHCA funded loans to reflect grants, if permitted by program rules;

(III) A reduction in the permanent loan amount for non-TDHCA funded loans based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(ii) If the DCR is greater than the minimum, the recommendations of the Report may be conditioned upon an increase in the debt service and the Underwriter may make adjustments to the requested financing structure in the order presented in subclauses (I) and (II) of this clause. If the DCR is greater than the maximum, the recommendations of the Report are conditioned upon an increase in the debt service and the Underwriter will make adjustments to the assumed financing structure in the order presented in subclauses (I) - (III) of this clause.

(I) A reclassification of TDHCA funded grants to reflect loans, if permitted by program rules;

(II) An increase in the interest rate or a decrease in the amortization period for TDHCA funded loans;

(III) An increase in the permanent loan amount for non-TDHCA funded loans based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(iii) For Housing Tax Credit Developments, a reduction in the recommended Tax Credit allocation may be made based on the gap/DCR method described in subsection (c)(2) of this section.

(iv) Although adjustments in Debt Service may become a condition of the Report, future changes in income, expenses, and financing terms could allow for an acceptable DCR.

(5) Long Term Proforma. The Underwriter will create a 30-year operating proforma.

(A) The base year projection utilized is the Underwriter's Year 1 EGI, Year 1 operating expenses, and Year 1 NOI unless the Applicant's Year 1 EGI, Year 1 total operating expenses, and Year 1 NOI are each within 5% of the Underwriter's estimates.

(B) A 2% annual growth factor is utilized for income and a 3% annual growth factor is utilized for expenses.

(C) Adjustments may be made to the Long Term Proforma if sufficient support documentation is provided by the Applicant. Support may include.

(i) Documentation with terms for project-based rental assistance or operating subsidy;

(ii) A fully executed management contract with clear terms;

(iii) Documentation prepared and signed by the Central Appraisal District (CAD) with jurisdiction over the Development indicating the appraisal methodology consistently employed by the CAD and a ten-year history, beginning with the Application year, of tax rates for each taxing district with jurisdiction over the Development; and

(iv) Required reserve for replacement schedule prepared and signed by the proposed permanent lender or equity provider. In no instance will the reserve for replacement figure included in the Long Term Proforma be less than the minimum requirements as described in §1.37 of this subchapter.

(e) Development Costs. The Development's need for permanent funds and, when applicable, the Development's Eligible Basis is based upon the projected total development costs. The Department's estimate of the total development cost will be based on the Applicant's project cost schedule to the extent that it can be verified to a reasonable degree of certainty with documentation from the Applicant and tools available to the Underwriter. For new construction Developments, the Underwriter's total cost estimate will be used unless the Applicant's total development cost is within 5% of the Underwriter's estimate. The Department's estimate of the total development cost for acquisition/rehabilitation will be based in accordance with the PCA's estimated cost for the scope of work as defined by the Applicant and §1.36(5) of this subchapter. In the case of a rehabilitation Development, the Underwriter may use a lower tolerance level due to the reliance upon the PCA. If the Applicant's total development cost is utilized and the Applicant's line item costs are inconsistent with documentation provided in the Application or program rules, the Underwriter may make adjustments to the Applicant's total cost estimate.

(1) Acquisition Costs. The proposed acquisition price is verified with the fully executed site control document(s) for the entire proposed site.

(A) Excess Land Acquisition. Where more land is being acquired than will be utilized for the site and the remainder acreage is not being utilized as permanent green space, the value ascribed to the proposed Development will be prorated based on acreage from the total cost reflected in the site control document(s). An appraisal containing segregated values for the total acreage, the acreage for the subject site and the remainder acreage, or tax assessment value may be tools that are used by the Underwriter in making a proration determination based on relative value; however, the Underwriter will not utilize a prorated value greater than the total amount in the site control document(s).

(B) Identity of Interest Acquisitions.

(i) The acquisition will be considered an identity of interest transaction when an Affiliate of, a Related Party to, or any owner at any level of the Development Team or permanent lender.

(I) Is the current owner in whole or in part of the proposed property; or

(II) Was the owner in whole or in part of the proposed property during any period within the thirty-six (36) months prior to the first day of the Application Acceptance Period.

(ii) In all identity of interest transactions the Applicant is required to provide subclauses (I) and (II) of this clause.

(I) The original acquisition cost listed in the submitted settlement statement or, if a settlement statement is not available, the original asset value listed in the most current audited financial statement for the identity of interest owner; and

(II) If the original acquisition cost evidenced by subclause (I) of this clause is less than the acquisition cost claimed in the application:

(-a-) an appraisal that meets the requirements of §1.34 of this subchapter; and

(-b-) any other verifiable costs of owning, holding, or improving the Property, excluding seller financing, that when added to the value from subclause (I) of this clause justifies the Applicant's proposed acquisition amount.

(-1-) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include Property taxes, interest expense, a calculated return on equity at 10%, the cost of any physical improvements made to the Property, the cost of rezoning, replatting or developing the Property, or any costs to provide or improve access to the Property.

(-2-) For transactions which include existing buildings that will be rehabilitated or otherwise maintained as part of the Development, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the Property, a calculated return on equity at a rate of 10%, and allow the cost of exit taxes not to exceed an amount necessary to allow the sellers to be made whole in the original and subsequent investment in the Property and avoid foreclosure.

(iii) In no instance will the acquisition cost utilized by the Underwriter exceed the lesser of the original acquisition cost evidenced by clause (ii)(I) of this subparagraph plus costs identified in clause (ii)(II)(-b-) of this subparagraph, or the "as-is" value conclusion evidenced by clause (ii)(II)(-a-) of this subparagraph.

(C) Acquisition of Buildings for Tax Credit Properties. In order to make a determination of the appropriate building acquisition value, the Applicant will provide and the Underwriter will utilize an appraisal that meets the Department's Appraisal Rules and Guidelines as described in §1.34 of this subchapter. The Underwriter will prorate the actual sales price or identity of interest adjusted sales price based upon a calculated "as-is" improvement value over the total "as-is" value provided in the appraisal, so long as the resulting land value utilized by the Underwriter is not less than the land value indicated in the appraisal or tax assessment. In the case where the land value indicated by either the appraisal or tax assessment is greater than the prorata land value attributed to the sales price as described above, the greater of the land value in the appraisal or tax assessment is deducted from the sales price to determine the acquisition basis.

(2) Off-Site Costs. Off-Site costs are costs of development up to the site itself such as the cost of roads, water, sewer and other utilities to provide the site with access. All off-site costs must be well documented and certified by a Third Party engineer on the required application form. If off-site costs are included in eligible basis based on PLR 200916007, an opinion from a CPA must also be provided which describes the facts relevant to the development and affirmatively certifies that the fact pattern of the development matches the fact pattern in PLR 200916007. A certification from a Third Party engineer must also be provided that describes the circumstances of the necessity of the off-site improvement, including the relevant requirements of the local jurisdiction with authority over building codes.

(3) Site Work Costs. Project site work costs exceeding $9,000 per Unit must be well documented and certified by a Third Party engineer on the required application form. In addition, for Applicants seeking Tax Credits, documentation in keeping with §50.9(h)(6)(G) of this title will be utilized in calculating eligible basis.

(4) Direct Construction Costs. Direct construction costs are the costs of materials and labor required for the building or rehabilitation of a Development.

(A) New Construction. The Underwriter will use the Marshall and Swift Residential Cost Handbook or equivalent other comparable published third-party cost estimating data source and historical final cost certifications of all previous Housing Tax Credit allocations to estimate the direct construction cost for a new construction Development. If the Applicant's estimate is more than 5% greater or less than the Underwriter's estimate, the Underwriter will attempt to reconcile this concern and ultimately identify this as a cost concern in the Report.

(i) The "Average Quality" multiple, townhouse, or single family costs, as appropriate, from the Marshall and Swift Residential Cost Handbook or equivalent other comparable published third-party data source, based upon the details provided in the application and particularly site and building plans and elevations will be used to estimate direct construction costs. If the Development contains amenities or specifications not included in the Average Quality standard, the Department will take into account these costs.

(ii) If the difference in the Applicant's direct cost estimate and the direct construction cost estimate detailed in clause (i) of this subparagraph is more than 5%, the Underwriter shall also evaluate the direct construction cost of the Development based on acceptable cost parameters as adjusted for inflation and as established by historical final cost certifications of all previous housing tax credit allocations for:

(I) the county in which the Development is to be located; or

(II) if cost certifications are unavailable under subclause (I) of this clause, the uniform state service region in which the Development is to be located; or

(III) other Developments by the same Applicant that are similar in design to the subject Development.

(B) Rehabilitation including Reconstruction Costs. In the case where the Applicant has provided a PCA which is inconsistent with the Applicant's figures as proposed in the development cost schedule and/or the Applicant's scope of work, the Underwriter may request a supplement executed by the PCA provider reconciling the Applicant's estimate and detailing the difference in costs. If said supplement is not provided or the Underwriter determines that the reasons for the initial difference in costs are not well-documented, the Underwriter utilizes the initial PCA estimations in lieu of the Applicant's estimates.

(5) Contingency. All contingencies identified in the Applicant's project cost schedule including any soft cost contingency will be added to Contingency with the total limited to the guidelines detailed in this paragraph. Contingency is limited to a maximum of 7% of direct construction costs plus site work for new construction Developments and 10% of direct construction costs plus site work for rehabilitation Developments. For Housing Tax Credit Developments, the percentage is applied to the sum of the eligible direct construction costs plus eligible site work costs in calculating the eligible contingency cost. The Applicant's figure is used by the Underwriter if the figure is less than 5%.

(6) Contractor Fee. Contractor fees are limited to a total of 14% on Developments with Hard Costs of $3 million or greater, the lesser of $420,000 or 16% on Developments with Hard Costs less than $3 million and greater than $2 million, and the lesser of $320,000 or 18% on Developments with Hard Costs at $2 million or less. For tax credit Developments, the percentages are applied to the sum of the Eligible Hard Costs in calculating the eligible contractor fees. For Developments also receiving financing from TX-USDA-RHS, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or TX-USDA-RHS requirements. Additional fees for ineligible costs will be limited to the same percentage of ineligible construction costs but will be ineligible for tax credit basis purposes.

(7) Developer Fee. Developer fee claimed must be multiplied by the appropriate applicable percentage depending whether it is attributable to acquisition or rehabilitation basis, consistent with §50.9(d)(6) of this title. Additional fees for ineligible costs will be limited to the same percentage of ineligible development costs (15% for developments with 50 or more units, or 20% for developments with 49 or fewer units) but will be ineligible for tax credit basis purposes. All fees to related parties to the owner or developer for work determined by the Underwriter to be typically completed by the developer will be considered part of the Developer fee claimed.

(A) For Tax Credit Developments, the development cost associated with developer fees and Development Consultant (also known as Housing Consultant) fees included in Eligible Basis cannot exceed 15% of the project's Total Eligible Basis less developer fees for developments proposing 50 units or more and 20% of the project's Total Eligible Basis less developer fees for developments proposing 49 units or less, as defined in the QAP.

(B) In the case of a transaction requesting acquisition Tax Credits.

(i) the allocation of eligible developer fee in calculating rehabilitation/new construction Tax Credits will not exceed 15% of the rehabilitation/new construction basis less developer fees for developments proposing 50 units or more and 20% of the rehabilitation/new construction basis less developer fees for developments proposing 49 units or less; and

(ii) no developer fee attributable to an identity of interest acquisition of the Development will be included in Eligible Basis.

(C) For non-Tax Credit Developments, the percentage can be up to 15% but is based upon total development costs less the sum of the fee itself, land costs, the costs of permanent financing, excessive construction period financing described in paragraph (8) of this subsection, reserves, and any other identity of interest acquisition cost.

(8) Financing Costs. Eligible construction period financing is limited to not more than one (1) year's fully drawn construction loan funds at the construction loan interest rate indicated in the commitment. Any excess over this amount is removed to ineligible cost and will not be considered in the determination of developer fee.

(9) Reserves. The Department will utilize the amount described in the Applicant's project cost schedule if it is within the range of two to six (6) months of stabilized operating expenses less management fees and reserve for replacements plus debt service. Alternatively, the Underwriter may consider a greater amount proposed by the conventional lender or syndicator if the detail for such greater amount is well documented in the conventional lender or syndicator commitment letter.

(10) Other Soft Costs. For Tax Credit Developments all other soft costs are divided into eligible and ineligible costs. Eligible costs are defined by Internal Revenue Code but generally are costs that can be capitalized in the basis of the Development for tax purposes. Ineligible costs are those that tend to fund future operating activities. The Underwriter will evaluate and accept the allocation of these soft costs in accordance with the Department's prevailing interpretation of the Internal Revenue Code. If the Underwriter questions the eligibility of any soft costs, the Applicant is given an opportunity to clarify and address the concern prior to removal from Eligible Basis.

(f) Developer Capacity. The Department will review personal credit reports for development sponsors, developer fee recipients and those individuals anticipated to guarantee the completion of the Development. The Underwriter will evaluate the credit report and identify any bankruptcy, state or federal tax liens or other relevant credit risks for compliance with eligibility and debarment requirements in the QAP and statute.

(g) Other Underwriting Considerations. The Underwriter will evaluate numerous additional elements as described in subsection (b) of this section and those that require further elaboration are identified in this subsection.

(1) Floodplains. The Underwriter evaluates the site plan, floodplain map, survey and other information provided to determine if any of the buildings, drives, or parking areas reside within the 100-year floodplain. If such a determination is made by the Underwriter, the Report will include a condition that:

(A) The Applicant must pursue and receive a Letter of Map Amendment (LOMA) or Letter of Map Revision (LOMR-F); or

(B) The Applicant must identify the cost of flood insurance for the buildings and for the tenant's contents for buildings within the 100-year floodplain; or

(C) The Development must be designed to comply with the QAP, as proposed.

(2) The Underwriter will identify in the report any Developments funded or known and anticipated to be eligible for funding within one linear mile of the subject.

(3) Supportive Housing. The unique development and operating characteristics of Supportive Housing Developments may require special consideration in the following areas.

(A) Operating Income. The extremely-low-income tenant population typically targeted by a Supportive Housing Development may include deep-skewing of rents to well below the 50% AMI level or other maximum rent limits established by the Department. The Underwriter should utilize the Applicant's proposed rents in the Report as long as such rents are at or below the maximum rent limit proposed for the units and equal to any project based rental subsidy rent to be utilized for the Development;

(B) Operating Expenses. A Supportive Housing Development may have significantly higher expenses for payroll, management fee, security, resident support services, or other items than typical Affordable Housing Developments. The Underwriter will rely heavily upon the historical operating expenses of other Supportive Housing Developments provided by the Applicant or otherwise available to the Underwriter;

(C) DCR and Long Term Feasibility. Supportive Housing Developments may be exempted from the DCR requirements of subsection (d)(4)(D) of this section if the Development is anticipated to operate without conventional debt. Applicants must provide evidence of sufficient financial resources to offset any projected 15-year cumulative negative cash flows. Such evidence will be evaluated by the Underwriter on a case-by-case basis to satisfy the Department's long

term feasibility requirements and may take the form of one or a combination of the following. executed subsidy commitment(s), set-aside of Applicant's financial resources, to be substantiated by an audited financial statement evidencing sufficient resources, and/or proof of annual fundraising success sufficient to fill anticipated operating losses. If either a set aside of financial resources or annual fundraising are used to evidence the long term feasibility of a Supportive Housing Development, a resolution from the Applicant's governing board must be provided confirming their irrevocable commitment to the provision of these funds and activities; and/or

(D) Development Costs. For Supportive Housing that is styled as efficiencies, the Underwriter may use "Average Quality" dormitory costs, or costs of other appropriate design styles from the Marshall & Swift Valuation Service, with adjustments for amenities and/or quality as evidenced in the application, as a base cost in evaluating the reasonableness of the Applicant's direct construction cost estimate for new construction Developments.

(h) Work Out Development. Developments that are underwritten subsequent to Board approval in order to refinance or gain relief from restrictions may be considered infeasible based on the guidelines in this section, but may be characterized as "the best available option" or "acceptable available option" depending on the circumstances and subject to the discretion of the Underwriter as long as the option analyzed and recommended is more likely to achieve a better financial outcome for the property and the Department than the status quo.

(i) Feasibility Conclusion. An infeasible Development will not be recommended for funding or allocation unless the Underwriter can determine a plausible alternative feasible financing structure and conditions the recommendations of the report upon receipt of documentation supporting the alternative feasible financing structure. A development will be characterized as infeasible if paragraph (1) or (2) of this subsection applies. The Development will be characterized as infeasible if one or more of paragraphs (3) - (4) of this subsection applies unless paragraph (6)(B) of this subsection also applies.

(1) Gross Capture Rate. The method for determining the Gross Capture Rate for a Development is defined in §1.33(d)(10)(F) of this subchapter. The Underwriter will independently verify all components and conclusions of the Gross Capture Rate and may at their discretion use independently acquired demographic data to calculate demand and may make a determination of the effective Gross Capture Rate based upon an analysis of the Sub-market. The Development:

(A) is characterized as a Qualified Elderly Development (including the Elderly section of an Intergenerational Development) and the Gross Capture Rate exceeds 10% for the total proposed units; or

(B) is in an Urban Area and targets the general population, and the Gross Capture Rate exceeds 10% for the total proposed units; or

(C) is in a Rural Area and targets the general population, and the Gross Capture Rate exceeds 30%; or

(D) targets Persons with Special Needs and the Gross Capture rate exceeds 30%.

(E) Developments meeting the requirements of subparagraph (A), (B), (C), or (D) of this paragraph may avoid being characterized as infeasible if clause (i) or (ii) of this subparagraph apply.

(i) Replacement Housing. The Development is comprised of Affordable Housing which replaces previously existing substandard Affordable Housing within the Primary Market Area as defined in §1.33 of this subchapter on a Unit for Unit basis, and gives the displaced tenants of the previously existing substandard Affordable Housing a leasing preference.

(ii) Existing Housing. The Development is comprised of existing Affordable Housing which is at least 50% occupied and gives displaced existing tenants a leasing preference as stated in the submitted relocation plan.

(2) Deferred Developer Fee. Developments requesting an allocation of tax credits cannot repay the estimated deferred developer fee, based on the Underwriter's recommended financing structure, from cashflow within the first fifteen (15) years of the long term proforma as described in subsection (d)(5) of this section.

(3) Restricted Market Rent. The Restricted Market Rent for units with rents restricted at 60% of AMGI is less than both the Net Program Rent and Market Rent for units with rents restricted at or below 50% of AMGI unless the Applicant accepts the Underwriting recommendation that all restricted units have rents and incomes restricted at or below the 50% of AMGI level.

(4) Initial Feasibility. The Year 1 annual total operating expense divided by the Year 1 Effective Gross Income is greater than 68% for rural developments 36 units or less and 65% for all other developments.

(5) Long Term Feasibility. Any year in the first fifteen (15) years of the Long Term Proforma, as defined in subsection (d)(5) of this section, reflects:

(A) negative Cash Flow; or

(B) a Debt Coverage Ratio below 1.15.

(6) Exceptions. The infeasibility conclusions may be excepted where either of the following apply.

(A) The requirements in this subsection may be waived by the Executive Director of the Department on appeal if documentation is submitted by the Applicant to support unique circumstances that would provide mitigation.

(B) Developments meeting the requirements of one or more of paragraphs (3) - (5) of this subsection will be re-characterized as feasible if one or more of clauses (i) - (vi) of this subparagraph apply.

(i) The Development will receive Project-based Section 8 Rental Assistance for at least 50% of the units and a firm commitment with terms including contract rent and number of units is submitted at application.

(ii) The Development will receive rental assistance for at least 50% of the units in association with USDA-RD-RHS financing.

(iii) The Development will be characterized as public housing as defined by HUD for at least 50% of the units.

(iv) The Development will be characterized as Supportive Housing for at least 50% of the units and evidence of adequate financial support for the long term viability of the Development is provided.

(v) The Development has other long term project based restrictions on rents for at least 50% of the units that allow rents to increase based upon expenses and the Applicant's proposed rents are at least 10% lower than both the Net Program Rent and Restricted Market Rent.

(vi) The units not receiving Project-based Section 8 Rental Assistance or rental assistance in association with USDA-RD-

RHS financing, or not characterized as public housing do not propose rents that are less than the Project-based Section 8, USDA-RD-RHS financing, or public housing units.

§1.33. Market Analysis Rules and Guidelines.

(a) General Provision. A Market Analysis prepared for the Department must evaluate the need for decent, safe, and sanitary housing at rental rates or sales prices that eligible tenants can afford. The analysis must determine the feasibility of the subject Property rental rates or sales price and state conclusions as to the impact of the Property with respect to the determined housing needs. The Market Analysis must include a statement that the report preparer has read and understood the requirements of this section.

(b) Self-Contained. A Market Analysis prepared for the Department must allow the reader to understand the market data presented, the analysis of the data, and the conclusions derived from such data. All data presented should reflect the most current information available and the report must provide a parenthetical (in-text) citation or footnote describing the data source. The analysis must clearly lead the reader to the same or similar conclusions reached by the Market Analyst. All steps leading to a calculated figure must be presented in the body of the report.

(c) Market Analyst Qualifications. A Market Analysis submitted to the Department must be prepared and certified by an approved Qualified Market Analyst (§2306.67055.) The Department will maintain an approved Market Analyst list based on the guidelines set forth in paragraphs (1) - (3) of this subsection.

(1) If not listed as approved by the Department, Market Analysts must submit subparagraphs (A) - (F) of this paragraph at least thirty (30) days prior to the first day of the Application Acceptance Period for which the Market Analyst must be approved. To maintain status as an approved Qualified Market Analyst, updates to the items described in subparagraphs (A) - (C) of this paragraph must be submitted annually on the first Monday in February for review by the Department.

(A) Documentation of good standing from the Texas Comptroller of Public Accounts.

(B) A current organization chart or list reflecting all members of the firm who may author or sign the Market Analysis.

(C) Resumes for all members of the firm or subcontractors who may author or sign the Market Analysis.

(D) General information regarding the firm's experience including references, the number of previous similar assignments and time frames in which previous assignments were completed.

(E) Certification from an authorized representative of the firm that the services to be provided will conform to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the application round in which each Market Analysis is submitted.

(F) A sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the sample Market Analysis is submitted.

(2) During the underwriting process each Market Analysis will be reviewed and any discrepancies with the rules and guidelines set forth in this section may be identified and require timely correction. Subsequent to the completion of the application round and as time permits, staff or a review appraiser will re-review a sample set of submitted market analyses to ensure that the Department's Market Analysis Rules and Guidelines are met. If it is found that a Market Analyst has not conformed to the Department's Market Analysis Rules and Guidelines, as certified to, the Market Analyst will be notified of the discrepancies in the Market Analysis and will be removed from the approved Qualified Market Analyst list.

(A) In and of itself, removal from the list of approved Market Analysts will not invalidate a Market Analysis commissioned prior to the removal date and at least ninety (90) prior to the first day of the applicable Application Acceptance Period.

(B) To be reinstated as an approved Qualified Market Analyst, the Market Analyst must amend the previous report to remove all discrepancies or submit a new sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the updated or new sample Market Analysis is submitted.

(3) The list of approved Qualified Market Analysts is posted on the Department's web site and updated within seventy-two (72) hours of a change in the status of a Market Analyst.

(d) Market Analysis Contents. A Market Analysis for a rental Development prepared for the Department must be organized in a format that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) - (12) of this subsection.

(1) Title Page. Include Property address or location, effective date of analysis, date report completed, name and address of person authorizing report, and name and address of Market Analyst.

(2) Letter of Transmittal. The date of the letter must be the date the report was completed. Include Property address or location, description of Property, statement as to purpose and scope of analysis, reference to accompanying Market Analysis report with effective date of analysis and summary of conclusions, date of Property inspection, name of persons inspecting subject Property, and signatures of all Market Analysts authorized to work on the assignment. Include a statement that the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Assumptions and Limiting Conditions. Include a description of all assumptions, both general and specific, made by the Market Analyst concerning the Property.

(5) Identification of the Property. Provide a statement to acquaint the reader with the Development. Such information includes street address, tax assessor's parcel number(s), and Development characteristics.

(6) Statement of Ownership. Disclose the current owners of record and provide a three (3) year history of ownership for the subject Property.

(7) Secondary Market Area. All of the Market Analyst's conclusions specific to the subject Development must be based on only one Secondary Market Area definition. The entire PMA, as described in paragraph (8) of this subsection, must be contained within the Secondary Market boundaries. The Market Analyst must adhere to the methodology described in this paragraph when determining the secondary market area (§2306.67055.)

(A) The Secondary Market Area will be defined by the Market Analyst with:

(i) size based on a base year population of no more than 250,000 people inclusive of the Primary Market Area; and

(ii) boundaries based on U.S. census tracts.

(B) The Market Analyst's definition of the Secondary Market Area must include:

(i) a detailed description of why the subject Development is expected to draw a significant number of tenants or homebuyers from the defined SMA;

(ii) a complete demographic report for the defined SMA; and

(iii) a scaled distance map indicating the SMA boundaries as well as the location of the subject Development and all comparable Developments.

(8) Primary Market Area. All of the Market Analyst's conclusions specific to the subject Development must be based on only one Primary Market Area definition. The Market Analyst must adhere to the methodology described in this paragraph when determining the market area (§2306.67055).

(A) The Primary Market Area will be defined by the Market Analyst with:

(i) size based on a base year population of no more than 100,000 people;

(ii) boundaries based on U.S. census tracts; and

(iii) the population of the PMA may exceed 100,000 if the amount over the limit is contained within a single census tract.

(B) The Market Analyst's definition of the Primary Market Area must include:

(i) a detailed description of why the subject Development is expected to draw a majority of its prospective tenants or homebuyers from the defined PMA;

(ii) a complete demographic report for the defined PMA; and

(iii) a scaled distance map indicating the PMA boundaries as well as the location of the subject Development and all comparable Developments.

(C) Comparable Units. Identify developments in the PMA with Comparable Units. In Primary Market Areas lacking sufficient rent comparables, it may be necessary for the Market Analyst to collect data from markets with similar characteristics and make quantifiable location adjustments. Provide a data sheet for each development consisting of:

(i) Development name;

(ii) Address;

(iii) Year of construction and year of rehabilitation, if applicable;

(iv) Property condition;

(v) Population target;

(vi) Unit mix specifying number of Bedrooms, number of baths, net rentable square footage; and

(I) monthly rent and utility allowance; or

(II) sales price with terms, marketing period and date of sale;

(vii) Description of concessions;

(viii) List of unit amenities;

(ix) Utility structure;

(x) List of common amenities; and

(xi) For rental developments only.

(I) occupancy; and

(II) turnover.

(9) Market Information.

(A) For each of the defined market areas, identify the number of units for each of the categories in clauses (i) - (vi) of this subparagraph; the data must be clearly labeled as relating to either the PMA or the SMA, if applicable:

(i) total housing;

(ii) rental developments (all multi-family);

(iii) Affordable Housing;

(iv) Comparable Units;

(v) Unstabilized Comparable Units; and

(vi) proposed Comparable Units.

(B) Occupancy. The occupancy rate indicated in the Market Analysis may be used to support both the overall demand conclusion for the proposed Development and the vacancy rate assumption used in underwriting the Development (§1.32(d)(1)(C) of this subchapter.) State the overall physical occupancy rate for the proposed housing tenure (renter or owner) within the defined market areas by:

(i) number of Bedrooms;

(ii) quality of construction (class);

(iii) Targeted Population; and

(iv) Comparable Units.

(C) Absorption. State the absorption trends by quality of construction (class) and absorption rates for Comparable Units.

(D) Demographic Reports.

(i) All demographic reports must include population and household data for a five (5) year period with the year of application as the base year;

(ii) All demographic reports must provide sufficient data to enable calculation of income-eligible, age-, size-, and tenure-appropriate household populations; and

(iii) For Developments targeting seniors, all demographic reports must provide a detailed breakdown of households by age and by income.

(E) Demand. Provide a comprehensive evaluation of the need for the proposed housing for the Development as a whole and each Unit type by number of Bedrooms proposed and rent restriction category within the defined market areas using the most current census and demographic data available.

(i) Demographics. The Market Analyst should use demographic data specific to the characteristics of the households that will be living in the proposed Development. For example, the Market Analyst should use demographic data specific to elderly population for an elderly Development, if available, and should avoid making adjustments from more general demographic data. If adjustment rates are used based on more general data for any of the following they should be clearly identified and documented as to their source in the report.

(I) Population. Provide population and household figures, supported by actual demographics, for a five (5) year period with the year of application as the base year.

(II) Target. If applicable, adjust the household projections for the Qualified Elderly or special needs population targeted by the proposed Development.

(III) Household Size-Appropriate. Adjust the household projections or target household projections, as applicable, for the appropriate household size for the proposed Unit type by number of Bedrooms proposed and rent restriction category based on 1.5 persons per Bedroom (round up).

(IV) Income Eligible. Adjust the household size appropriate projections for income eligibility based on the income bands for the proposed Unit type by number of Bedrooms proposed and rent restriction category with:

(-a-) the lower end of each income band calculated based on the lowest gross rent proposed divided by 35% for the general population and 50% for Qualified Elderly households; and

(-b-) the upper end of each income band equal to the applicable gross median income limit for the largest appropriate household size based on 1.5 persons per Bedroom (round up) or one person for efficiency units.

(V) Tenure-Appropriate. Adjust the income-eligible household projections for tenure (renter or owner). If tenure appropriate income eligible target household data is available, a tenure appropriate adjustment is not necessary.

(ii) Gross Demand. Gross Demand is defined as the sum of Potential Demand from the PMA, Demand from Other Sources, and Potential Demand from a Secondary Market Area (SMA) to the extent that SMA demand does not exceed 25% of Gross Demand.

(iii) Potential Demand. Potential Demand is defined as the number of income-eligible, age-, size-, and tenure-appropriate target households in the designated market area at the proposed placed in service date.

(I) Maximum eligible income is equal to the applicable gross median income limit for the largest appropriate household size based on 1.5 persons per Bedroom (round up) or one person for efficiency units.

(II) For Developments targeting the general population.

(-a-) Minimum eligible income is based on a 35% rent to income ratio;

(-b-) Appropriate household size is defined as 1.5 persons per Bedroom (rounded up); and

(-c-) The tenure-appropriate population for a rental Development is limited to the population of renter households.

(III) For Developments consisting solely of single family residences on separate lots with all units having three (3) or more bedrooms:

(-a-) Minimum eligible income is based on a 35% rent to income ratio;

(-b-) Appropriate household size is defined as 1.5 persons per bedroom (rounded up); and

(-c-) Gross Demand includes both renter and owner households.

(IV) For Developments targeting the senior population.

(-a-) Minimum eligible income is based on a 50% rent to income ratio; and

(-b-) Gross Demand includes all household sizes and both renter and owner households.

(iv) Demand from Secondary Market Area.

(I) Potential Demand from an SMA should be calculated in the same way as Potential Demand from the PMA;

(II) Potential Demand from an SMA may be included in Gross Demand to the extent that SMA demand does not exceed 25% of Gross Demand; and

(III) The supply of proposed and unstabilized comparable units in the SMA must be included in the calculation of the capture rate at the same proportion that Potential Demand from the SMA is included in Gross Demand.

(v) Demand from Other Sources.

(I) The source of additional demand and the methodology used to calculate the additional demand must be clearly stated;

(II) Consideration of Demand from Other Sources is at the discretion of the Underwriter;

(III) Demand from Other Sources must be limited to households that are not included in Potential Demand; and

(IV) If households with Section 8 vouchers are identified as a source of demand, the Market Study must include:

(-a-) Documentation of the number of vouchers administered by the local Housing Authority;

(-b-) A complete demographic report for the area in which the vouchers are distributed.

(10) Conclusions. Include a comprehensive evaluation of the subject Property, separately addressing each housing type and specific population to be served by the Development in terms of items in subparagraphs (A) - (I) of this paragraph. All conclusions must be consistent with the data and analysis presented throughout the Market Analysis.

(A) Unit Mix. Provide a best possible unit mix conclusion based on the occupancy rates by Bedroom type within the PMA and target, income-eligible, size-appropriate and tenure-appropriate household demand within the PMA.

(B) Rents. Provide a separate Market Rent and Restricted Market Rent conclusion for each proposed Unit type by number of Bedrooms and rent restriction category. Conclusions of Market Rent or Restricted Market Rent below the maximum Net Program Rent limit must be well documented as the conclusions may impact the feasibility of the Development under §1.32(i) of this subchapter. Rent Adjustments. In support of the Market Rent and Restricted Market Rent conclusions, provide a separate attribute adjustment matrix for each proposed unit type by number of Bedrooms and rental restriction category.

(i) The Department recommends use of HUD Form 92273.

(ii) A minimum of three developments must be represented on each attribute adjustment matrix.

(iii) Adjustments for concessions must be included, if applicable.

(iv) Total adjustments in excess of 15% must be supported with additional narrative.

(v) Total adjustments in excess of 25% indicate the Units are not comparable for the purposes of determining Market Rent and Restricted Market Rent conclusions.

(C) Effective Gross Income. Provide rental income, secondary income, and vacancy and collection loss projections for the subject derived independent of the Applicant's estimates.

(D) Demand:

(i) State the Gross Demand for each Unit type by number of Bedrooms proposed and rent restriction category (e.g. one-Bedroom units restricted at 50% of AMFI; two-Bedroom units restricted at 60% of AMFI);

(ii) State the Gross Demand for the proposed Development as a whole. If some households are eligible for more than one unit due to overlapping eligible ranges for income or household size, Gross Demand should be adjusted to avoid including households more than once.

(E) Relevant Supply. The relevant supply of proposed and unstabilized comparable units includes.

(i) The proposed subject Units;

(ii) Comparable Units with priority, as defined in §50.9 of this title, over the subject that have made application to TDHCA and have not been presented to the TDHCA Board for decision; and

(iii) Comparable Units in previously approved but Unstabilized Developments in the PMA; and

(iv) Comparable Units in previously approved but Unstabilized Developments in the SMA, in the same proportion as the proportion of Potential Demand from the SMA that is included in Gross Demand.

(F) Gross Capture Rate. The Gross Capture Rate is defined as the Relevant Supply divided by the Gross Demand. The Market Analyst must calculate a Gross Capture Rate for the subject Development as a whole, as well as for each Unit type by number of Bedrooms and rent restriction categories, and market rate Units, if applicable. Refer to §1.32(i) of this subchapter for feasibility criteria.

(G) A complete demand and capture rate analysis is required in every Market Study, regardless of the current occupancy level of an existing Development.

(H) Absorption. Project an absorption period for the subject Development to achieve Sustaining Occupancy. State the absorption rate.

(I) Market Impact. Provide an assessment of the impact the subject Development, as completed, will have on existing Developments supported by Housing Tax Credits in the Primary Market (§2306.67055).

(11) Photographs. Provide labeled color photographs of the subject Property, the neighborhood, street scenes, and comparables. An aerial photograph is desirable but not mandatory.

(12) Appendices. Any Third Party reports including demographics relied upon by the Market Analyst must be provided in appendix form. A list of works cited including personal communications also must be provided, and the Modern Language Association (MLA) format is suggested.

(e) The Department reserves the right to require the Market Analyst to address such other issues as may be relevant to the Department's evaluation of the need for the subject Development and the provisions of the particular program guidelines.

(f) In the event that the PMA for a subject Development overlaps the PMA's of other proposed or unstabilized comparable Developments, the Underwriter may perform an extended Sub-Market analysis considering the combined PMA's and all proposed and unstabilized units in the extended Sub-Market Area; the Gross Capture Rate from such an extended Sub-Market Area analysis may be used as the basis for a feasibility conclusion.

(g) All Applicants shall acknowledge, by virtue of filing an application, that the Department shall not be bound by any such opinion or Market Analysis, and may substitute its own analysis and underwriting conclusions for those submitted by the Market Analyst.

§1.34. Appraisal Rules and Guidelines.

(a) General Provision. An appraisal prepared for the Department must conform to the Uniform Standards of Professional Appraisal Practice (USPAP) as adopted by the Appraisal Standards Board of the Appraisal Foundation. The appraisal must include a statement that the report preparer has read and understood the requirements of this section.

(b) Self-Contained. An appraisal prepared for the Department must describe sufficient and adequate data and analyses to support the final opinion of value. The final value(s) must be reasonable, based on the information included. Any Third Party reports relied upon by the appraiser must be verified by the appraiser as to the validity of the data and the conclusions.

(c) Appraiser Qualifications. The qualifications of each appraiser are determined on a case-by-case basis by the Director of Real Estate Analysis or review appraiser, based upon the quality of the report itself and the experience and educational background of the appraiser. At minimum, a qualified appraiser must be appropriately certified or licensed by the Texas Appraiser Licensing and Certification Board.

(d) Appraisal Contents. An appraisal prepared for the Department must be organized in a format that follows a logical progression. In addition to the contents described in USPAP Standards Rule 2, the appraisal must include items addressed in paragraphs (1) - (12) of this subsection.

(1) Title Page. Include a statement identifying the Department as the client, acknowledging that the Department is granted full authority to rely on the findings of the report, and name and address of person authorizing report.

(2) Letter of Transmittal. Include reference to accompanying appraisal report, reference to all person(s) that provided significant assistance in the preparation of the report, date of report, effective date of appraisal, date of property inspection, name of person(s) inspecting the property, tax assessor's parcel number(s) of the site, estimate of marketing period, and signatures of all appraisers authorized to work on the assignment including the appraiser who inspected the property. Include a statement indicating the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Disclosure of Competency. Include appraiser's qualifications, detailing education and experience.

(5) Statement of Ownership of the Subject Property. Discuss all prior sales of the subject property which occurred within the past three (3) years. Any pending agreements of sale, options to buy, or listing of the subject property must be disclosed in the appraisal report.

(6) Property Rights Appraised. Include a statement as to the property rights (e.g., fee simple interest, leased fee interest, leasehold, etc.) being considered. The appropriate interest must be defined in terms of current appraisal terminology with the source cited.

(7) Site/Improvement Description. Discuss the site characteristics including subparagraphs (A) - (E) of this paragraph.

(A) Physical Site Characteristics. Describe dimensions, size (square footage, acreage, etc.), shape, topography, corner influence, frontage, access, ingress-egress, etc. associated with the site. Include a plat map and/or survey.

(B) Floodplain. Discuss floodplain (including flood map panel number) and include a floodplain map with the subject clearly identified.

(C) Zoning. Report the current zoning and description of the zoning restrictions and/or deed restrictions, where applicable, and type of Development permitted. Any probability of change in zoning should be discussed. A statement as to whether or not the improvements conform to the current zoning should be included. A statement addressing whether or not the improvements could be rebuilt if damaged or destroyed, should be included. If current zoning is not consistent with the highest and best use, and zoning changes are reasonable to expect, time and expense associated with the proposed zoning change should be considered and documented. A zoning map should be included.

(D) Description of Improvements. Provide a thorough description and analysis of the improvements including size (net rentable area, gross building area, etc.), number of stories, number of buildings, type/quality of construction, condition, actual age, effective age, exterior and interior amenities, items of deferred maintenance, energy efficiency measures, etc. All applicable forms of depreciation should be addressed along with the remaining economic life.

(E) Environmental Hazards. It is recognized appraisers are not experts in such matters and the impact of such deficiencies may not be quantified; however, the report should disclose any potential environmental hazards (e.g., discolored vegetation, oil residue, asbestos-containing materials, lead-based paint etc.) noted during the inspection.

(8) Highest and Best Use. Market Analysis and feasibility study is required as part of the highest and best use. The highest and best use analysis should consider paragraph (7)(A) - (E) of this subsection as well as a supply and demand analysis.

(A) The appraisal must inform the reader of any positive or negative market trends which could influence the value of the appraised property. Detailed data must be included to support the appraiser's estimate of stabilized income, absorption, and occupancy.

(B) The highest and best use section must contain a separate analysis "as if vacant" and "as improved" (or "as proposed to be improved/renovated"). All four elements (legally permissible, physically possible, feasible, and maximally productive) must be considered.

(9) Appraisal Process. It is mandatory that all three approaches, Cost Approach, Sales Comparison Approach and Income Approach, are considered in valuing the property. If an approach is not applicable to a particular property an adequate explanation must be provided. A land value estimate must be provided if the cost approach is not applicable.

(A) Cost Approach. This approach should give a clear and concise estimate of the cost to construct the subject improvements. The source(s) of the cost data should be reported.

(i) Cost comparables are desirable; however, alternative cost information may be obtained from Marshall & Swift Valuation Service or similar publications. The section, class, page, etc. should be referenced. All soft costs and entrepreneurial profit must be addressed and documented.

(ii) All applicable forms of depreciation must be discussed and analyzed. Such discussion must be consistent with the description of the improvements.

(iii) The land value estimate should include a sufficient number of sales which are current, comparable, and similar to the subject in terms of highest and best use. Comparable sales information should include address, legal description, tax assessor's parcel number(s), sales price, date of sale, grantor, grantee, three (3) year sales history, and adequate description of property transferred. The final value estimate should fall within the adjusted and unadjusted value ranges. Consideration and appropriate cash equivalent adjustments to the comparable sales price for subclauses (I) - (VII) of this clause should be made when applicable.

(I) Property rights conveyed.

(II) Financing terms.

(III) Conditions of sale.

(IV) Location.

(V) Highest and best use.

(VI) Physical characteristics (e.g., topography, size, shape, etc.).

(VII) Other characteristics (e.g., existing/proposed entitlements, special assessments, etc.).

(B) Sales Comparison Approach. This section should contain an adequate number of sales to provide the reader with a description of the current market conditions concerning this property type. Sales data should be recent and specific for the property type being appraised. The sales must be confirmed with buyer, seller, or an individual knowledgeable of the transaction.

(i) Sales information should include address, legal description, tax assessor's parcel number(s), sales price, financing considerations and adjustment for cash equivalency, date of sale, recordation of the instrument, parties to the transaction, three (3) year sale history, complete description of the property and property rights conveyed, and discussion of marketing time. A scaled distance map clearly identifying the subject and the comparable sales must be included.

(ii) The method(s) used in the Sales Comparison Approach must be reflective of actual market activity and market participants.

(I) Sale Price/Unit of Comparison. The analysis of the sale comparables must identify, relate, and evaluate the individual adjustments applicable for property rights, terms of sale, conditions of sale, market conditions, and physical features. Sufficient narrative must be included to permit the reader to understand the direction and magnitude of the individual adjustments, as well as a unit of comparison value indicator for each comparable.

(II) Net Operating Income/Unit of Comparison. The net operating income statistics or the comparables must be calculated in the same manner. It should be disclosed if reserves for replacement have been included in this method of analysis. At least one other method should accompany this method of analysis.

(C) Income Approach. This section must contain an analysis of both the actual historical and projected income and expense aspects of the subject property.

(i) Market Rent Estimate/Comparable Rental Analysis. This section of the report should include an adequate number of actual market transactions to inform the reader of current market conditions concerning rental units. The comparables must indicate current research for this specific property type. The comparables must be confirmed with the landlord, tenant or agent and individual data sheets must be included. The individual data sheets should include property address, lease terms, description of the property (e.g., unit type, unit size, unit mix, interior amenities, exterior amenities, etc.), physical characteristics of the property, and location of the comparables. Analysis of the Market Rents should be sufficiently detailed to permit the reader to understand the appraiser's logic and rationale. Adjustment for lease rights, condition of the lease, location, physical characteristics of the property, etc. must be considered.

(ii) Comparison of Market Rent to Contract Rent. Actual income for the subject along with the owner's current budget projections must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. The contract rents should be compared to the market-derived rents. A determination should be made as to whether the contract rents are below, equal to, or in excess of market rates. If there is a difference, its impact on value must be qualified.

(iii) Vacancy/Collection Loss. Historical occupancy data and current occupancy level for the subject should be reported and compared to occupancy data from the rental comparables and overall occupancy data for the subject's Primary Market.

(iv) Expense Analysis. Actual expenses for the subject, along with the owner's projected budget, must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. Historical expenses should be compared to comparables expenses of similar property types or published survey data (e.g., IREM, BOMA, etc.). Any expense differences should be reconciled. Include historical data regarding the subject's assessment and tax rates and a statement as to whether or not any delinquent taxes exist.

(v) Capitalization. The appraiser should present the capitalization method(s) reflective of the subject market and explain the omission of any method not considered in the report.

(I) Direct Capitalization. The primary method of deriving an overall rate (OAR) is through market extraction. If a band of investment or mortgage equity technique is utilized, the assumptions must be fully disclosed and discussed.

(II) Yield Capitalization (Discounted Cash Flow Analysis). This method of analysis should include a detailed and supportive discussion of the projected holding/investment period, income and income growth projections, occupancy projections, expense and expense growth projections, reversionary value and support for the discount rate.

(10) Value Estimates. Reconciliation final value estimate is required.

(A) All appraisals shall contain a separate estimate of the "as vacant" market value of the underlying land, based upon current sales comparables. The appraiser should consider the fee simple or leased fee interest as appropriate.

(B) Appraisal assignments for new construction are required to provide an "as completed" value of the proposed structures. These reports shall provide an "as restricted with favorable financing" value as well as an "unrestricted market" value.

(C) Reports on Properties to be rehabilitated shall address the "as restricted with favorable financing" value as well as both an "as is" value and an "as completed" value. The appraiser should consider the fee simple or leased fee interest as appropriate.

(D) If required the appraiser must include a separate assessment of personal property, furniture, fixtures, and equipment (FF&E) and/or intangible items. If personal property, FF&E, or intangible items are not part of the transaction or value estimate, a statement to such effect should be included.

(11) Marketing Time. Given property characteristics and current market conditions, the appraiser(s) should employ a reasonable marketing period. The report should detail existing market conditions and assumptions considered relevant.

(12) Photographs. Provide good quality color photographs of the subject property (front, rear, and side elevations, on-site amenities, interior of typical units if available). Photographs should be properly labeled. Photographs of the neighborhood, street scenes, and comparables should be included. An aerial photograph is desirable but not mandatory.

(e) Additional Appraisal Concerns. The appraiser(s) must be aware of Department program rules and guidelines and the appraisal must include analysis of any impact to the subject's value.

§1.35. Environmental Site Assessment Rules and Guidelines.

(a) General Provisions. The Environmental Site Assessments (ESA) prepared for the Department should be conducted and reported in conformity with the standards of the American Society for Testing and Materials. The initial report should conform with the Standard Practice for Environmental Site Assessments. Phase I Assessment Process (ASTM Standard Designation. E1527-05). Any subsequent reports should also conform to ASTM standards and such other recognized industry standards as a reasonable person would deem relevant in view of the Property's anticipated use for human habitation. The environmental assessment shall be conducted by a Third Party environmental professional at the expense of the Applicant, and addressed to TDHCA as a User of the report (as defined by ASTM standards). Copies of reports provided to TDHCA which were commissioned by other financial institutions should address TDHCA as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to TDHCA. The ESA report should also include a statement that the person or company preparing the ESA report will not materially benefit from the Development in any other way than receiving a fee for performing the Environmental Site Assessment, and that the fee is in no way contingent upon the outcome of the assessment. The ESA report must contain a statement indicating the report preparer has read and understood the requirements of this section.

(b) In addition to ASTM requirements, the report must:

(1) State if a noise study is recommended for a property in accordance with current HUD guidelines and identify its proximity to industrial zones, major highways, active rail lines, civil and military airfields, or other potential sources of excessive noise;

(2) Provide a copy of a current survey, if available, or other drawing of the site reflecting the boundaries and adjacent streets, all improvements on the site, and any items of concern described in the body of the environmental site assessment or identified during the physical inspection;

(3) Provide a copy of the current FEMA Flood Insurance Rate Map showing the panel number and encompassing the site with the site boundaries precisely identified and superimposed on the map;

(4) If the subject site includes any improvements or debris from pre-existing improvements, state if testing for asbestos containing materials (ACMs) would be required pursuant to local, state, and federal laws, or recommended due to any other consideration;

(5) If the subject site includes any improvements or debris from pre-existing improvements, state if testing for Lead Based Paint would be required pursuant to local, state, and federal laws, or recommended due to any other consideration;

(6) State if testing for lead in the drinking water would be required pursuant to local, state, and federal laws, or recommended due to any other consideration such as the age of pipes and solder in existing improvements; and

(7) Assess the potential for the presence of Radon on the property, and recommend specific testing if necessary.

(c) If the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site but would nonetheless affect the Property, the Development Owner must act on such a recommendation or provide a plan for either the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Application submittal.

(d) For Developments in programs that allow a waiver of the Phase I ESA such as a TX-USDA-RHS funded Development, the Development Owners are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(e) Those Developments which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms to the requirements of this subsection.

§1.36. Property Condition Assessment Guidelines.

(a) General Provisions. The objective of the Property Condition Assessment is to provide cost estimates for repairs, replacements, or new construction which are: immediately necessary repairs and replacements; improvements proposed by the Applicant as outlined in a scope of work narrative submitted by the Applicant to the PCA provider that is consistent with the scope of work provided in the Application; and expected to be required throughout the term of the regulatory period and not less than thirty (30) years. The PCA prepared for the Department should be conducted and reported in conformity with the American Society for Testing and Materials "Standard Guide for Property Condition Assessments. Baseline Property Condition Assessment Process (ASTM Standard Designation. E 2018") except as provided for in subsections (b) and (c) of this section. The PCA report must contain a statement indicating the report preparer has read and understood the requirements of this section. The PCA must include the Department's PCA Cost Schedule Supplement which details all rehabilitation costs and projected repairs and replacements through thirty (30) years. The PCA must also include discussion and analysis of the following.

(1) Useful Life Estimates. For each system and component of the property the PCA should assess the condition of the system or component, and estimate its remaining useful life, citing the basis or the source from which such estimate is derived;

(2) Code Compliance. The PCA should review and document any known violations of any applicable federal, state, or local codes. In developing the cost estimates specified herein, it is the responsibility of the Housing Sponsor or Applicant to ensure that the PCA adequately considers any and all applicable federal, state, and local laws and regulations which may govern any work performed to the subject property;

(3) Program Rules. The PCA should assess the extent to which any systems or components must be modified, repaired, or replaced in order to comply with any specific requirements of the housing program under which the Development is proposed to be financed, particular consideration being given to accessibility requirements, the Department's Housing Quality Standards, and any scoring criteria for which the Applicant may claim points;

(4) Statement of Acknowledgement. The PCA provider must affirm in the report that the Applicant's scope of work for improvements and the immediate needs of the rehabilitation are considered and reconciled within the PCA report and the PCA Cost Schedule Supplement; and

(5) Cost Estimates for Repair and Replacement. It is the responsibility of the Housing Sponsor or Applicant to ensure that the PCA provider is apprised of all development activities associated with the proposed transaction and consistency of the total immediately necessary and proposed repair and replacement cost estimates with the development cost schedule and scope of work submitted as an exhibit of the Application.

(A) Immediately Necessary Repairs and Replacement. Systems or components which are expected to have a remaining useful life of less than one (1) year, which are found to be in violation of any applicable codes, which must be modified, repaired or replaced in order to satisfy program rules, or which are otherwise in a state of deferred maintenance or pose health and safety hazards should be considered immediately necessary repair and replacement. The PCA must provide a separate estimate of the costs associated with the repair, replacement, or maintenance of each system or component which is identified as being an immediate need, citing the basis or the source from which such cost estimate is derived.

(B) Proposed Repair, Replacement, or New Construction. If the development plan calls for additional repair, replacement, or new construction above and beyond the immediate repair and replacement described in subparagraph (A) of this paragraph, such items must be identified and the nature or source of obsolescence or improvement to the operations of the Property discussed. The PCA must provide a separate estimate of the costs associated with the repair, replacement, or new construction which is identified as being above and beyond the immediate need, citing the basis or the source from which such cost estimate is derived.

(C) Expected Repair and Replacement Over Time. The term during which the PCA should estimate the cost of expected repair and replacement over time must equal the longest term of any land use or regulatory restrictions which are, or will be, associated with the provision of housing on the property. The PCA must estimate the periodic costs which are expected to arise for repairing or replacing each system or component or the property, based on the estimated remaining useful life of such system or component as described in paragraph (1) of this subsection adjusted for completion of repair and replacement immediately necessary and proposed as described in subparagraphs (A) and (B) of this paragraph. The PCA must include a separate table of the estimated long term costs which identifies in each line the individual component of the property being examined, and in each column the year during the term in which the costs are estimated to be incurred and no less than fifteen (15) years. The estimated costs for future years should be given in both present dollar values and anticipated future dollar values assuming a reasonable inflation factor of not less than 2.5% per annum.

(b) If a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied, the Department will also accept copies of reports commissioned or required by the primary lender for a proposed transaction, which have been prepared in accordance with.

(1) Fannie Mae's criteria for Physical Needs Assessments;

(2) Federal Housing Administration's criteria for Project Capital Needs Assessments;

(3) Freddie Mac's guidelines for Engineering and Property Condition Reports;

(4) TX-USDA-RHS guidelines for Capital Needs Assessment; or

(5) Standard and Poor's Property Condition Assessment Criteria. Guidelines for Conducting Property Condition Assessments, Multifamily Buildings.

(c) The Department may consider for acceptance reports prepared according to other standards which are not specifically named above in subsection (b) of this section, if a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied.

(d) The PCA shall be conducted by a Third Party at the expense of the Applicant, and addressed to TDHCA as the client. Copies of reports provided to TDHCA which were commissioned by other financial institutions should address TDHCA as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to TDHCA. The PCA report should also include a statement that the person or company preparing the PCA report will not materially benefit from the Development in any other way than receiving a fee for performing the PCA. The PCA report must contain a statement indicating the report preparer has read and understood the requirements of this section. The PCA should be signed and dated by the report provider not more than six (6) months prior to the date of the application.

§1.37. Reserve for Replacement Rules and Guidelines.

(a) General Provisions. The Department will require Developments to provide regular maintenance to keep housing sanitary, safe and decent by maintaining a reserve for replacement in accordance with §2306.186, Texas Government Code. The reserve must be established for each unit in a Development of 25 or more rental units, regardless of the amount of rent charged for the unit. The Department shall, through cooperation of its divisions responsible for asset management and compliance, ensure compliance with this section.

(b) The First Lien Lender shall maintain the reserve account through an escrow agent acceptable to the First Lien Lender to hold reserve funds in accordance with an executed escrow agreement and the rules set forth in this section and §2306.186, Texas Government Code.

(1) Where there is a First Lien Lender other than the Department or a Bank Trustee as a result of a bond indenture or tax credit syndication, the Department shall.

(A) Be a required signatory party in all escrow agreements for the maintenance of reserve funds;

(B) Be given notice of any asset management findings or reports, transfer of money in reserve accounts to fund necessary repairs, and any financial data and other information pursuant to the oversight of the Reserve Account within thirty (30) days of any receipt or determination thereof; and

(C) Subordinate its rights and responsibilities under the escrow agreement, including those described in this subsection, to the First Lien Lender or Bank Trustee through a subordination agreement subject to its ability to do so under the law and normal and customary limitations for fraud and other conditions contained in the Department's standard subordination clause agreements as modified from time to time, to include subsection (c) of this section.

(2) The escrow agreement and subordination agreement, if applicable, shall further specify the time and circumstances under which the Department can exercise its rights under the escrow agreement in order to fulfill its obligations under §2306.186, Texas Government Code, and as described in this section.

(3) Where the Department is the First Lien Lender and there is no Bank Trustee as a result of a bond indenture or tax credit syndication or where there is no First Lien Lender but the allocation of funds by the Department and §2306.186, Texas Government Code, requires that the Department oversee a Reserve Account, the Owner shall provide at their sole expense for appointment of an escrow agent acceptable to the Department to act as Bank Trustee as necessary under this section. The Department shall retain the right to replace the escrow agent with another Bank Trustee or act as escrow agent at a cost plus fee payable by the Owner due to breach of the escrow agent's responsibilities or otherwise with thirty (30) days prior notice of all parties to the escrow agreement.

(c) If the Department is not the First Lien Lender with respect to the Development, each Owner receiving Department assistance for multifamily rental housing shall submit on an annual basis within the Department's required Owner's Financial Certification packet a signed certification by the First Lien Lender including.

(1) Reserve for replacement requirements under the first lien loan agreement;

(2) Monitoring standards established by the First Lien Lender to ensure compliance with the established reserve for replacement requirements; and

(3) A statement by the First Lien Lender.

(A) That the Development has met all established reserve for replacement requirements; or

(B) Of the plan of action to bring the Development in compliance with all established reserve for replacement requirements, if necessary.

(d) If the Development meets the minimum unit size described in subsection (a) of this section and the establishment of a Reserve Account for repairs has not been required by the First Lien Lender or Bank Trustee, each Owner receiving Department assistance for multifamily rental housing shall set aside the repair reserve amount as described in subsection (e)(1) - (3) of this section through the date described in subsection (f)(2) of this section through the appointment of an escrow agent as further described in subsection (b)(3) of this section.

(e) If the Department is the First Lien Lender with respect to the Development, each Owner receiving Department assistance for multifamily rental housing shall deposit annually into a Reserve Account through the date described in subsection (f)(2) of this section.

(1) For new construction Developments.

(A) Not less than $150 per unit per year for units one to five (5) years old; and

(B) Not less than $200 per unit per year for units six or more years old.

(2) For rehabilitation Developments.

(A) An amount per unit per year established by the Department's division responsible for credit underwriting based on the information presented in a Property Condition Assessment in conformance with §1.36 of this subchapter; and

(B) Not less than $300 per unit per year.

(3) For either new construction or rehabilitation Developments, the Owner of a multifamily rental housing Development shall contract for a third-party Property Condition Assessment meeting the requirements of §1.36 of this subchapter and the Department will reanalyze the annual reserve requirement based on the findings and other support documentation.

(A) A Property Condition Assessment will be conducted.

(i) At appropriate intervals that are consistent with requirements of the First Lien Lender, other than the Department; or

(ii) At least once during each five-year period beginning with the 11th year after the awarding of any financial assistance for the Development by the Department, if the Department is the First Lien Lender or the First Lien Lender does not require a third-party Property Condition Assessment.

(B) Submission by the Owner to the Department will occur within thirty (30) days of completion of the Property Condition Assessment and must include.

(i) The complete Property Condition Assessment;

(ii) First Lien Lender and/or Owner response to the findings of the Property Condition Assessment;

(iii) Documentation of repairs made as a result of the Property Condition Assessment; and

(iv) Documentation of adjustments to the amounts held in the replacement Reserve Account based upon the Property Condition Assessment.

(f) A Land Use Restriction Agreement or restrictive covenant between the Owner and the Department must require:

(1) The Owner to begin making annual deposits to the reserve account on the later of:

(A) The date that occupancy of the Development stabilizes as defined by the First Lien Lender or in the absence of a First Lien Lender other than the Department, the date the property is at least 90% occupied; or

(B) The date that permanent financing for the Development is completely in place as defined by the First Lien Lender or in the absence of a First Lien Lender other than the Department, the date when the permanent loan is executed and funded;

(2) The Owner to continue making deposits until the earliest of the following dates:

(A) The date on which the Owner suffers a total casualty loss with respect to the Development;

(B) The date on which the Development becomes functionally obsolete, if the Development cannot be or is not restored;

(C) The date on which the Development is demolished;

(D) The date on which the Development ceases to be used as a multifamily rental property; or

(E) The later of:

(i) The end of the affordability period specified by the Land Use Restriction Agreement or restrictive covenant; or

(ii) The end of the repayment period of the first lien loan.

(g) The duties of the Owner of a multifamily rental housing Development under this section cease on the date of a change in ownership of the Development; however, the subsequent Owner of the Development is subject to the requirements of this section.

(h) If the Department is the First Lien Lender with respect to the Development or the First Lien Lender does not require establishment of a Reserve Account, the Owner receiving Department assistance for multifamily rental housing shall submit on an annual basis within the Department's required Owner's Financial Certification packet:

(1) Financial statements, audited if available, with clear identification of the replacement Reserve Account balance and all capital improvements to the Development within the fiscal year;

(2) Identification of costs other than capital improvements funded by the replacement Reserve Account; and

(3) Signed statement of cause for:

(A) Use of replacement Reserve Account for expenses other than necessary repairs, including property taxes or insurance;

(B) Deposits to the replacement Reserve Account below the Department's or First Lien Lender's mandatory levels as defined in subsections (c), (d) and (e) of this section; and

(C) Failure to make a required deposit.

(i) If a request for extension or waiver is not approved by the Department, Department action, including a penalty of up to $200 per dwelling unit in the Development and/or characterization of the Development as Materially Non-Compliant, as defined in §60.1 of this title, may be taken when:

(1) A Reserve Account, as described in this section, has not been established for the Development;

(2) The Department is not a party to the escrow agreement for the Reserve Account;

(3) Money in the Reserve Account:

(A) Is used for expenses other than necessary repairs, including property taxes or insurance; or

(B) Falls below mandatory deposit levels;

(4) Owner fails to make a required deposit;

(5) Owner fails to contract for the third party Property Condition Assessment as required under subsection (e)(3) of this section; or

(6) Owner fails to make necessary repairs, as defined in subsection (k) of this section.

(j) On a case by case basis, the Department may determine that the money in the Reserve Account may:

(1) Be used for expenses other than necessary repairs, including property taxes or insurance, if:

(A) Development income before payment of return to Owner or deferred developer fee is insufficient to meet operating expense and debt service requirements; and

(B) The funds withdrawn from the Reserve Account are replaced as cashflow after payment of expenses, but before payment of return to Owner or developer fee is available;

(2) Fall below mandatory deposit levels without resulting in Department action, if:

(A) Development income after payment of operating expenses, but before payment of return to Owner or deferred developer fee is insufficient to fund the mandatory deposit levels; and

(B) Subsequent deposits to the Reserve Account exceed mandatory deposit levels as cashflow after payment of operating expenses, but before payment of return to Owner or deferred developer fee is available until the Reserve Account has been replenished to the mandatory deposit level less capital expenses to date.

(k) The Department or its agent may make repairs to the Development if the Owner fails to complete necessary repairs indicated in the submitted Property Condition Assessment or identified by physical inspection. Repairs may be deemed necessary if the Development is notified of the Owner's failure to comply with federal, state and/or local health, safety, or building code.

(1) Payment for necessary repairs must be made directly by the Owner or through a replacement Reserve Account established for the Development under this section.

(2) The Department or its agent will produce a Request for Bids to hire a contractor to complete and oversee necessary repairs.

(l) This section does not apply to a Development for which the Owner is required to maintain a Reserve Account under any other provision of federal or state law.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 11, 2009.

TRD-200904004
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 475-3916

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CHAPTER 33. 2008 MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§33.1 - 33.10

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of §§33.1 - 33.10, concerning the 2008 Multifamily Housing Revenue Bond Rules. The sections are proposed to be repealed in order to enact new sections.

Michael G. Gerber, Executive Director, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Mr. Gerber has also determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be to permit the adoption of new rules for multifamily housing revenue bonds, thereby enhancing the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

The public comment period will be held between September 18, 2009 to October 26, 2009 to receive input on these rules and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2010 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 469-9606. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 26, 2009.

The repeals are proposed pursuant to the authority of the Texas Government Code, Chapter 2306.

No other code, article or statute is affected by these proposed repeals.

§33.1. Introduction.
§33.2. Authority.
§33.3. Definitions.
§33.4. Policy Ojectives and Eligible Developments.
§33.5. Bond Rating and Investment Letter.
§33.6. Application Procedures, Evaluation and Approval.
§33.7. Regulatory and Land Use Restrictions.
§33.8. Fees.
§33.9. Waiver of Rules.
§33.10. No Discrimination.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 11, 2009.

TRD-200904002
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 475-3916

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CHAPTER 33. 2010 MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§33.1 - 33.10

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 33, §§33.1 - 33.10, concerning the 2010 Multifamily Housing Revenue Bond Rules. The new sections are proposed in order to implement changes that will improve the 2010 Private Activity Bond Program.

Mr. Michael Gerber, Executive Director, has determined that for the first five year period the new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections.

Mr. Gerber has also determined that for each year of the first five years the new sections are in effect the public benefit anticipated will be to permit the adoption of new rules for multifamily housing revenue bonds, thereby enhancing the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed.

The public comment period will be held between September 18, 2009 to October 26, 2009 to receive input on these rules and public hearings will be held. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2010 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 469-9606. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 26, 2009.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by these proposed new sections.

§33.1. Introduction.

The purpose of this chapter is to state the Texas Department of Housing and Community Affairs (the "Department") requirements for issuing Bonds, the procedures for applying for multifamily housing revenue Bond financing, and the regulatory and land use restrictions imposed upon Developments financed with the issuance of Bonds for the 2010 Private Activity Bond Program Year. The rules and provisions contained in this chapter are separate from the rules relating to the Department's administration of the Housing Tax Credit Program. Applicants seeking a housing tax credit allocation should consult the Department's Qualified Allocation Plan and Rules ("QAP"), in effect for the program year for which the Housing Tax Credit application will be submitted. If the applicable QAP contradicts rules set forth in this chapter, the applicable QAP will take precedence over the rules in the chapter. The Department encourages the participation in the Multifamily Bond programs by working directly with Applicants, lenders, trustees, legal counsels, local and state officials and the general public to conduct business in an open, transparent and straightforward manner. The Department has simplified the process, within the limitation of statute, to affirmatively support and create affordable housing throughout the State of Texas.

§33.2. Authority.

The Texas Department of Housing and Community Affairs (the "Department") receives its authority to issue Bonds from Chapter 2306 of the Texas Government Code. All Bonds issued by the Department must conform to the requirements of the Act. Notwithstanding anything herein to the contrary, tax-exempt Bonds which are issued to finance the Development of multifamily rental housing are specifically subject to the requirements of the laws of the State of Texas, including but not limited to Chapter 2306 and Chapter 1372 of the Texas Government Code relating to Private Activity Bonds, and to the requirements of the Code (as defined in this chapter).

§33.3. Definitions.

The following words and terms, when used in the chapter, shall have the following meaning, unless context clearly indicates otherwise.

(1) Administrative Deficiency--As defined in §50.3(2) of this title.

(2) Applicant--As defined in §50.3(7) of this title.

(3) Application--As defined in §50.3(8) of this title.

(4) Board--The Governing Board of the Department.

(5) Bond--An evidence of indebtedness or other obligation, regardless of the sources of payment, issued by the Texas Department of Housing and Community Affairs (the "Department") under the Act, including a bond, note, or bond or revenue anticipation note, regardless of whether the obligation is general or special, negotiable, or nonnegotiable, in bearer or registered form, in certified or book entry form, in temporary or permanent form, or with or without interest coupons.

(6) Code--The U.S. Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued by the United States Department of the Treasury or the Internal Revenue Service.

(7) Development--As defined in §50.3(32) of this title.

(8) Development Owner--As defined in §50.3(35) of this title.

(9) Eligible Tenants--

(A) Individuals and families of Extremely Low, Very Low and Low Income;

(B) Individuals and families of Moderate Income; or

(C) Persons with Special Needs, in each case, with an Anticipated Annual Income not in excess of 140% of the area median income for a four-person household in the applicable standard metropolitan statistical area; provided that all Low-Income Tenants shall count as Eligible Tenants.

(10) Extremely Low Income--The income received by an individual or family whose income does not exceed 30% of the area median income or applicable federal poverty line, as determined by the Act.

(11) Family of Moderate Income--A family:

(A) that is determined by the Board to require assistance taking into account:

(i) the amount of total income available for the housing needs of the individuals and family;

(ii) the size of the family;

(iii) the cost and condition of available housing facilities;

(iv) the ability of the individuals and family to compete successfully in the private housing market and to pay the amounts required by private enterprise for sanitary, decent, and safe housing; and

(v) standards established for various federal programs determining eligibility based on income; and

(B) that does not qualify as a family of Low Income.

(12) Ineligible Building Type--As defined in §50.3(58) of this title.

(13) Institutional Buyer--

(A) An accredited investor as defined in Regulation D promulgated under the Securities Act of 1933, as amended (17 CFR §230.501(a)), but excluding any natural person or any director or executive officer of the Department (17 CFR §230.501(a)(4) - (6)); or

(B) A qualified institutional buyer as defined by Rule 144A promulgated under the Securities Act of 1935, as amended (17 CFR §230.144A).

(14) Intergenerational Housing--As defined in §50.3(59) of this title.

(15) Low Income--The income received by an individual or family whose income does not exceed 80% of the area median income or applicable federal poverty line, as determined by the Act.

(16) Land Use Restriction Agreement (LURA)--An agreement between the Department and the Development Owner which is binding upon the Development Owner's successors in interest that encumbers the Development with respect to the requirements of this chapter, Chapter 2306, Texas Government Code, and the requirements of the Code, §42. (§2306.6702)

(17) Material Deficiency--As defined in §50.3(65) of this title.

(18) New Construction--As defined in §50.3(70) of this title.

(19) Owner--An Applicant that is approved by the Department as qualified to own, construct, acquire, rehabilitate, operate, manage, or maintain a Development subject to the regulatory powers of the Department and other terms and conditions required by the Department and the Act.

(20) Persons with Special Needs--Persons who:

(A) Are considered to be disabled under a state or federal law;

(B) Are elderly;

(C) Are designated by the Board as experiencing a unique need for decent, safe housing that is not being met adequately by private enterprise; or

(D) Are legally responsible for caring for an individual described by subparagraphs (A), (B) or (C) of this paragraph and meet the income guidelines established by the Board.

(21) Private Activity Bonds--Any Bonds described by §141(a) of the Code.

(22) Private Activity Bond Program Scoring Criteria--The scoring criteria established by the Department for the Department's Multifamily Housing Revenue Bond Program, §33.6(e) of this chapter.

(23) Private Activity Bond Program Threshold Requirements--The threshold requirements established by the Department for the Department's Multifamily Housing Revenue Bond Program, §33.6(d) of this chapter.

(24) Program--The Department's Multifamily Housing Revenue Bond Program.

(25) Proper Site Control--Regarding the legal control of the land to be used for the Development, means the earnest money contract is in the name of the Applicant (principal or member of the General Partner); fully executed by all parties and escrowed by the title company.

(26) Property--The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built thereon in connection with the Application.

(27) Qualified 501(c)(3) Bonds--Any Bonds described by §145(a) of the Code.

(28) Rehabilitation--As defined in §50.3(86) of this title.

(29) Rural Area--An area that is located (this definition is not the same as Rural Projects as defined in §520 of the Housing Act of 1949 for purposes of determining rural income as described in H.R 3221):

(A) Outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(B) Within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 25,000 or less and does not share a boundary with an Urban Area; or

(C) In an Area that is eligible for funding by Texas Rural Development Office of the United States Department of Agriculture (TRDO-USDA), other than an area that is located in a municipality with a population of more than 50,000 (§2306.004).

(30) Rural Development--A Development or proposed Development that is located in a Rural Area, other than rural new construction Developments with more than 80 units.

(31) Tenant Income Certification--A certification as to income and other matters executed by the household members of each tenant in the Development, in such form as reasonably may be required by the Department in satisfaction of the criteria prescribed by the Secretary of Housing and Urban Development under §8(f)(3) of the Housing Act of 1937 ("the Housing Act") (42 U.S.C. §1437f) for purposes of determining whether a family is a lower income family within the meaning of the §8(f)(1) of the Housing Act.

(32) Tenant Services--Social services, including child care, transportation, and basic adult education, that are provided to individuals residing in low income housing under Title IV-A, Social Security Act (42 U.S.C. §§601 et seq.), and other similar services.

(33) Tenant Services Program Plan--The plan, subject to approval by the Department, which describes the Tenant Services to be provided by the Development Owner in a Development.

(34) Trustee--A national banking association organized and existing under the laws of the United States, as trustee (together with its successors and assigns and any successor trustee).

(35) TRDO-USDA--As defined in §50.3(104) of this title.

(36) Unit--As defined in §50.3(105) of this title.

(37) Very Low Income--The income received by an individual or family whose income does not exceed 60% of the area median income or applicable federal poverty line as determined under the Act.

§33.4. Policy Objectives and Eligible Developments.

The Texas Department of Housing and Community Affairs (the "Department") will issue Bonds to finance the rehabilitation, preservation

or construction of decent, safe and affordable housing throughout the State of Texas. Eligible Developments may include those which are constructed, acquired, or rehabilitated and which provide housing for individuals and families of Low Income, Very Low Income, or Extremely Low Income, and Families of Moderate Income.

§33.5. Bond Rating and Investment Letter.

(a) Bond Ratings. All publicly offered Bonds issued by the Texas Department of Housing and Community Affairs (the "Department") to finance Developments shall have and be required to maintain a debt rating the equivalent of at least an "A" rating assigned to long-term obligations by Standard & Poor's Ratings Services, a division of The McGraw-Hill Companies, Inc. or Moody's Investors Service, Inc. If such rating is based upon credit enhancement provided by an institution other than the Applicant or Development Owner, the form and substance of such credit enhancement shall be subject to approval by the Board, which approval shall be evidenced by adoption by the Board of a resolution authorizing the issuance of the credit-enhanced Bonds. Remedies relating to failure to maintain appropriate credit ratings shall be provided in the financing documents relating to the Development.

(b) Investment Letters. Bonds rated less than "A," or Bonds which are unrated must be placed with one or more Institutional Buyers and must be accompanied by an investment letter acceptable to the Department. Subsequent purchasers of such Bonds shall also be qualified as Institutional Buyers and shall sign and deliver to the Department an investment letter in a form acceptable to the Department. Bonds rated less than "A" and Bonds which are unrated shall be issued in physical form, in minimum denominations of one hundred thousand dollars ($100,000), and shall carry a legend requiring any purchasers of the Bonds to sign and deliver to the Department an investment letter in a form acceptable to the Department.

§33.6. Application Procedures, Evaluation and Approval.

(a) Application Costs, Costs of Issuance, Responsibility and Disclaimer. The Applicant shall pay all costs associated with the preparation and submission of the Application--including costs associated with the publication and posting of required public notices--and all costs and expenses associated with the issuance of the Bonds, regardless of whether the Application is ultimately approved or whether Bonds are ultimately issued. At any stage during the Application process, the Applicant is solely responsible for determining whether to proceed with the Application, and the Texas Department of Housing and Community Affairs (the "Department") disclaims any and all responsibility and liability in this regard.

(b) Pre-application. An Applicant who requests financing from the Department for a Development shall submit a pre-application in a format prescribed by the Department. Within fourteen (14) days of the Department's receipt of the pre-application, the Department will be responsible for federal, state, and local community notifications of the proposed Development. Upon review of the pre-application, if the Development is determined to be ineligible for Bond financing by the Department, the Department will send a letter to the Applicant explaining the reason for the ineligibility. If the Development is determined to be eligible for Bond financing by the Department, the Department will score and rank the pre-application based on the Private Activity Bond Program Scoring Criteria as described in subsection (e) of this section. The Department will rank the pre-application with higher scores ranking higher within each priority defined by §1372.0321, Texas Government Code. All Priority 1 Applications will be ranked above all Priority 2 Applications which will be ranked above all Priority 3 Applications, regardless of score, reflecting a priority structure which gives consideration to the income levels of the tenants and the rent levels of the units consistent with §2306.359. This priority ranking will be used throughout the calendar year. In the event two or more Applications receive the same score, the Department will use, as a tie-breaking mechanism, a priority first for Applications involving rehabilitation; then if a tie still exists, the Application with the greatest number of points awarded for Quality and Amenities for the Development; then if a tie still exists, the Department will grant preference to the pre-application with the lower number of net rentable square feet per bond amount requested. Pre-Applications must meet the threshold requirements as stated in the Private Activity Bond Program Threshold Requirements as set out in subsection (d) of this section. After scoring and ranking, the Development and the proposed financing structure will be presented to the Department's Board for consideration of a resolution declaring the Department's initial intent to issue Bonds (the "inducement resolution") with respect to the Development. After Board approval of the inducement resolution, the induced Applications will be submitted to the Texas Bond Review Board for its lottery, waiting list or carryforward processing in rank order. The Texas Bond Review Board will draw the number of lottery numbers that equates to the number of eligible Applications submitted by the Department for participation in lottery. The lottery numbers drawn will not equate to a specific Development. The Texas Bond Review Board will thereafter assign the lowest lottery number drawn to the highest ranked Application as previously determined by the Department. The Texas Bond Review Board will issue reservations of allocation for Applications submitted for the waiting list or carryforward in the order provided by the Department based on rank. The criteria by which a Development may be deemed to be eligible or ineligible are explained in subsection (j) of this section (relating to Eligibility Criteria). The Private Activity Bond Program Scoring Criteria will be posted on the Department's website.

(c) Approval of the inducement resolution does not guarantee final Board approval of the Bond Application. Department staff, for good cause, may recommend that the Board not approve an inducement resolution for an Application. The Texas Department of Housing and Community Affairs (TDHCA) Board of Directors reviews the Development as a whole for adherence to timelines and notification rules in the Qualified Allocation Plan and Rules, the need for the Development, compliance with local government rules and procedures, financial feasibility and the input of local and state officials and interested community members. These factors and others will be used to make the final determination at the appropriate time. Because each Development is unique, making the final determination is often dependent on the issues presented at the time the Application is presented to the Board.

(d) Pre-Application Threshold Requirements.

(1) As the Department reviews the Application, the Department will use the following assumptions, even if not reflected by the Applicant in the Application. Prequalification Assumptions:

(A) Development Feasibility:

(i) Debt Coverage Ratio must be greater than or equal to 1.15;

(ii) Deferred Developer Fees are limited to 80% of Developer's Fees;

(iii) Contractor Fee, Overhead and General Requirements are limited to 14% of direct costs plus site work cost; and

(iv) Developer Fees cannot exceed 15% of the project's Total Eligible Basis.

(B) Construction Costs Per Unit Assumption. Costs not to exceed $85 per square foot for general population developments

and $95 for elderly developments (Acquisition/Rehab developments are exempt from this requirement);

(C) Anticipated Interest Rate and Term. As stated in the Summary of Financing Participants in the pre-application;

(D) Size of Units (Acquisition/Rehab developments are exempt from this requirement):

(i) Efficiency Units must be at least 550 square feet;

(ii) One bedroom Unit must be greater than or equal to 650 square feet for family and 550 square feet for senior Units;

(iii) Two bedroom Unit must be greater than or equal to 900 square feet for family and 700 square feet for senior Units;

(iv) Three bedroom Unit must be greater than or equal to 1,000 square feet;

(v) Four bedroom Unit must be greater than or equal to 1,200 square feet.

(2) Appropriate Zoning. Evidence of appropriate zoning for the proposed use or evidence of application made and pending decision;

(3) Executed Site Control. Properly executed and escrow receipted site control through the inducement Board meeting at pre-application and ninety (90) days from the date of the bond reservation with the option to extend through the scheduled TDHCA Board meeting at full application. The potential expiration of site control does not warrant the application being presented to the TDHCA Board prior to the scheduled meeting;

(4) Current Market Information (must support affordable rents);

(5) Completed current TDHCA Bond Pre-Application;

(6) Completed Multifamily Rental Worksheets;

(7) Certification of Local Elected Official request for neighborhood organization information and Public Notification Information;

(8) Completed 2010 Bond Review Board Residential Rental Attachment;

(9) Signed letter of Responsibility for All Costs Incurred;

(10) Signed Mortgage Revenue Bond Program Certification Letter;

(11) Evidence of Paid Application Fees ($1,000 to TDHCA, $2,000 to Vinson and Elkins, as the Department's bond counsel, and $5,000 to Bond Review Board);

(12) Boundary Survey or Plat clearly identifying the location and boundaries of the subject property;

(13) Local Area map showing the location of the Property and Community Services/Amenities within a three (3) mile radius;

(14) Utility Allowance documented from the Appropriate Local Housing Authority;

(15) Organization Chart showing the structure of the Applicant and the ownership structure of any principals of the Applicant with evidence of Entity Registration or Reservation with the Office of the Secretary of State;

(16) Required Notification. Evidence of notification is required in the form of the "Certification of Notifications" form provided in the pre-application stating that they made all the required notifications prior to the deadlines and a copy of the entire mailing list on the "Public Information Form" (including names and complete addresses) of all the recipients. Proof of delivery of the notification must not be older than three months prior to the date of Application submission date. Notification must be sent to all the following individuals and entities (If the QAP and Rules in effect for the program year for which the Bond and Housing Tax Credit applications are submitted reflect a notification process that is different from the process listed in subparagraphs (A) - (F) of this paragraph, then the QAP and Rules will override the notification process listed in subparagraphs (A) - (F) of this paragraph):

(A) State Senator and Representative that represents the community containing the development;

(B) Presiding Officer of the governing body of any municipality containing the development and all elected members of that body (Mayor, City Council members);

(C) Presiding Officer of the governing body of the county containing the development and all elected members of that body (County Judge and/or Commissioners);

(D) School District Superintendent of the school district containing the development;

(E) Presiding Officer of the School Board of Trustees of the school district containing the development; and

(F) Evidence in the form of a certification that all of the notifications required under this paragraph have been made. Requests for Neighborhood Organizations under clause (i) of this subparagraph must be made by the deadlines described in that clause. Evidence of notification must meet the requirements identified in clause (ii) of this subparagraph to all of the individuals and entities identified in clause (iii) of this subparagraph.

(i) The Applicant must request Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as follows:

(I) No later than fourteen (14) days prior to the date the Application is submitted, the Applicant must e-mail, fax or mail with registered receipt a completed, "Neighborhood Organization Request" letter as provided in the Pre-Application materials to the local elected official for the city and county where the Development is proposed to be located. If the Development is located in an Area that has district based local elected officials, or both at-large and district based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located in an Area that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. If the Development is not located within a city or is located in the Extra Territorial Jurisdiction (ETJ) of a city, the county local elected official must be contacted. In the event that local elected officials refer the Applicant to another source, the Applicant must request neighborhood organizations from that source in the same format;

(II) If no reply letter is received from the local elected officials by seven (7) days prior to the Application submission, then the Applicant must certify to that fact with the "Pre-Application Notification Certification Form" provided in the Pre-Application materials; and

(III) The Applicant must list all Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as provided by the local elected officials, or that the Applicant has knowledge of (irrespective of whether the organization is on record with the county or state) as

of the Pre-Application submission in the "Certification of Notification Form" provided in the Pre-Application.

(ii) No later than the date the Pre-Application is submitted, Notification must be sent to all of the following individuals and entities by e-mail, fax or mail with registered receipt (e-mail or fax to be "receipt confirmed") in the format required in the "Pre-Application Notification Template" provided in the Pre-Application materials. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are not required to notify city officials; however the county officials are required to be notified. Evidence of Notification is required in the form of a certification in the "Certification of Notification Form" provided in the Pre-Application materials. It is strongly encouraged that Applicants retain proof of delivery of the notifications to the persons or entities prescribed in subclauses (I) - (IX) of this clause in the event the Department requires proof of Notification. Evidence of proof of delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of receipt by recipient for facsimile and electronic mail. Officials to be notified are those officials in office at the time the Pre-Application is submitted.

(I) Neighborhood Organizations on record with the state or county whose boundaries contain the proposed Development Site as identified in clause (i)(III) of this subparagraph;

(II) Superintendent of the school district containing the Development;

(III) Presiding officer of the board of trustees of the school district containing the Development;

(IV) Mayor of any municipality containing the Development;

(V) All elected members of the governing body of any municipality containing the Development;

(VI) Presiding officer of the governing body of the county containing the Development;

(VII) All elected members of the governing body of the county containing the Development;

(VIII) State representative of the district containing the Development; and

(IX) State senator of the district containing the Development.

(iii) Each such notice must include, at a minimum, all of the following:

(I) The Applicant's name, address, individual contact name and phone number;

(II) The Development name, address, city and county;

(III) A statement informing the entity or individual being notified that the Applicant is submitting a request for Private Activity Bonds and Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(IV) Statement of whether the Development proposes New Construction or Rehabilitation;

(V) The type of Development being proposed (single family homes, duplex, apartments, townhomes, high-rise etc.) and population being served (family, Intergenerational Housing, or elderly);

(VI) The approximate total number of Units and approximate total number of low-income Units;

(VII) The approximate percentage of Units serving each level of AMGI (e.g. 20% at 50% of AMGI, etc.) and the percentage of Units that are market rate; and

(VIII) The number of Units and proposed rents (less utility allowances) for the low-income Units and the number of Units and the proposed rents for any market rate Units. Rents to be provided are those that are effective at the time of the Pre-Application, which are subject to change as annual changes in the area median income occur.

(17) All New Construction or Reconstruction units must provide the amenities in subparagraphs (A) - (H) of this paragraph. Rehabilitation (excluding Reconstruction) must provide the amenities in subparagraphs (B) - (H) of this paragraph unless expressly identified as not required (§2306.187).

(A) All new construction units must be wired with RG-6 COAX or better and CAT3 phone cable or better, wired to each bedroom, dining room and living room;

(B) Blinds or window coverings for all windows;

(C) Disposal and Energy-Star or equivalently rated dishwasher (not required for TRDO-USDA Developments);

(D) Energy-Star or equivalently rated Refrigerator (not required for SRO Developments);

(E) Oven/Range (not required for SRO Developments);

(F) Exhaust/vent fans (vented to the outside) in bathrooms;

(G) Energy-Star or equivalently rated ceiling fans in living areas and bedrooms; and

(H) Energy-Star or equivalently rated lighting in all Units which may include compact fluorescent bulbs.

(e) Pre-Application Scoring Criteria.

(1) Income and rent levels of the tenants: Priority 1 applications will receive 10 points, Priority 2 applications will receive 7 points and Priority 3 applications will receive 5 points.

(2) Construction Cost Per Unit includes: direct hard costs, site work, contractor profit, overhead, general requirements and contingency. Calculation will be hard costs per square foot of net rentable area. Must be greater than or equal to $85 per square foot for general population Developments and $95 per square foot for elderly Developments (1 point) (Acquisition/Rehab will automatically receive (1 point)).

(3) Size of Units. Average size of all Units combined in the development must be greater than or equal to 950 square foot for family and must be greater than or equal to 750 square foot for elderly (5 points). (Acquisition/Rehab developments will automatically receive 5 points).

(4) Period of Guaranteed Affordability for Low Income Tenants. Add ten (10) years of affordability after the extended use period for a total affordability period of forty (40) years (1 point).

(5) Quality and Amenities Substitutions in amenities will be allowed as long as the overall score is not affected. Applications in which Developments provide specific qualities and amenities at no extra charge to the tenant will be awarded points as follows: Acquisition/Rehab developments will receive 1.5 points for each item.

(A) Laundry Connections (2 points);

(B) Self-cleaning or continuous cleaning ovens (1 point);

(C) Microwave Ovens (in each Unit) (1 point);

(D) Refrigerator with icemaker (1 point);

(E) Laundry equipment (washer and dryers) for each individual Unit including a front load washer and dryer in required UFAS compliant Units (3 points);

(F) Storage Room of approximately 9 square feet or greater (does not include bedroom, entryway or linen closets (does not have to be in the unit but must be on the property site) (1 point);

(G) Covered entries (1 point);

(H) Nine foot ceilings in living room and all bedrooms (at minimum) (1 point);

(I) Covered patios or covered balconies (1 point);

(J) Covered Parking (including garages) of at least one covered space per Unit (2 points);

(K) High speed internet service to all Units at no cost to residents (2 points);

(L) Fire sprinklers in all Units (2 points);

(M) 100% masonry on exterior, which can include stucco, cementitious board products, concrete brick and mortarless concrete masonry; excludes EIFS synthetic stucco (3 points). Applicants may not select this item if subparagraph (N) of this paragraph is selected;

(N) Greater than 75% Masonry on exterior, which can include stucco and cementitious board products, concrete brick and mortarless concrete masonry; excludes EIFS synthetic stucco (1 point). Applicants may not select this item if subparagraph (M) of this paragraph is selected;

(O) Thirty year architectural shingle roofing (1 point);

(P) Use of energy efficient alternative construction materials (structurally insulated panels) with wall insulation at a minimum of R-20 (3 points);

(Q) R-15 Walls/R-30 Ceilings (rating of wall system) (3 points);

(R) 14 SEER HVAC or evaporative coolers in dry climates for new construction, adaptive reuse and reconstruction or radiant barrier in the attic for the rehabilitation (3 points);

(S) One Children's Playscape Equipped for 5 to 12 years olds, or one Tot Lot (1 point);

(T) Two Children's Playscapes Equipped for 5 to 12 year olds, two Tot Lots, or one of each (2 points);

(U) Sport Court (Tennis, Basketball or Volleyball) (2 points);

(V) Enclosed sun porch or covered community porch/patio (2 points);

(W) BBQ Grills and Tables (at least one each per 50 Units) (1 point);

(X) Accessible walking path/jogging path separate from a sidewalk (1 point);

(Y) Full Perimeter Fencing (2 points);

(Z) Controlled access gate (1 point);

(AA) Equipped and functioning business center or equipped computer learning center with 1 computer for every 30 Units proposed in the Application, and 1 printer for every 3 computers (with a minimum of one printer), and 1 fax machine (2 points);

(BB) Furnished and staffed children's activity center (3 points);

(CC) Horseshoe pit, putting green or shuffleboard court (1 point);

(DD) Furnished Fitness Center equipped with a minimum of two of the following fitness equipment options with at least one per every 40 Units or partial increment of 40 Units: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, stationary weight bench, sauna, stair climber, etc. The maximum number of equipment options required for any Development, regardless of number of Units, shall be five (2 points);

(EE) Library with an accessible sitting area (separate from the community room) (1 point);

(FF) Gazebo with sitting area (1 point);

(GG) Covered Pavilion that includes barbeque grills and tables (2 points);

(HH) Swimming pool (3 points);

(II) Community laundry room (with at least one front loading washer) (1 point);

(JJ) Furnished Community room (1 point);

(KK) Service coordinator office in addition to leasing offices (1 point);

(LL) Senior Activity Room (Arts and Crafts, etc.) (2 points);

(MM) Health Screening Room (1 point);

(NN) Secured Entry (elevator buildings only) (1 point);

(OO) Community Dining Room with full or warming kitchen (3 points);

(PP) Community Theatre Room equipped with a 52 inch or larger screen with surround sound equipment, DVD player; and theatre seating (3 points);

(QQ) Green Building amenities: (Rehabilitation Developments will receive 1.5 points for each point requested for the green building amenities):

(i) passive solar heating/cooling (3 points maximum):

(I) Two points if the glazing area on the north- and south-facing walls of the building is at least 50% greater than the sum of the glazing area on the east- and west-facing walls; and the east-west axis of the building is within 15 degrees of due east-west;

(II) One point if in addition to subclause (I) of this clause, if the project utilizes a narrow floor plate (less than 40 feet) and single loaded corridors to optimize daylight penetration and passive ventilation; and solar screens or solar film on all East, West, and South Windows with building oriented to east-west axis within 15 degrees of due east-west, west-south axis within 15 degrees of due west-south, and south-east axis within 15 degrees of due south-east.

(ii) water conserving features (2 points maximum, 1 point for each):

(I) Install high efficiency toilets using less than or equal to 1.28 gallons/flush or WaterSense certified;

(II) Install bathroom lavatory faucets and showerheads that do not exceed 2.0 gallons/minute and kitchen faucets that do not exceed 1.5 gallons/minute. Applies to all fixtures throughout development. Rehab projects may choose to install compliant faucet aerators instead of replacing entire faucets;

(iii) Provide solar water heaters designed to provide at least 25% of the average energy used to heat domestic water throughout the entire development. (2 points);

(iv) irrigation and landscaping (2 points):

(I) collected water (at least 50%) for irrigation purposes;

(II) selection of native trees and plants that are appropriate to the site's soils and microclimate;

(v) sub-metered utility meters (2 points maximum):

(I) sub-metered utility meters on rehab project without existing sub-meters or new construction senior project (2 points); or

(II) sub-metered utility meters on new construction project (excluding new construction senior project) (1 point);

(vi) energy efficiency (4 points maximum);

(I) Three points if the development uses Energy-Star qualified windows and glass doors exclusively insulation, and air barriers greater than or equal to Energy Star air barrier and insulation criteria; and HVAC, and domestic hot water heater, or insulation that exceeds Energy Star standards; or

(II) Four points if the project promotes energy efficiency by meeting the requirements of Energy Star for Homes by either complying with the appropriate builder option package or a HERS score of 85;

(vii) thermally and draft efficient doors (SHGC of 0.40 or lower and U-value specified by climate zone according to the 2006 IECC) (2 points);

(viii) photovoltaic panels for electricity and design and wiring for the use of such panels (3 points maximum):

(I) Photovoltaic panels that total 10 kW (1 point);

(II) Photovoltaic panels that total 20 kW (2 points);

(III) Photovoltaic panels that total 30 kW (3 points);

(ix) construction waste management to divert a minimum of 50%of construction waste from landfills (1 point);

(x) implementation of EPA's Best Management Practices for erosion and sedimentation control during construction (1 point);

(xi) recycling service provided throughout the compliance period (1 point);

(xii) water permeable paving and walkways (at least 20% of walkways and parking) (1 point);

(xiii) renewable materials, provide at least one of the following: bamboo flooring, wool carpet, linoleum flooring, straw board cabinetry, poplar OSB, or cotton batt insulation (1 point);

(xiv) healthy flooring, provide at least one of the following for 50% of flooring finished concrete, ceramic tile, or a resilient flooring material that is Floor Score Certified, applied with a Floor Score Certified adhesive and comes with a minimum 7-year wear through warranty (1 point);

(xv) healthy finish materials; use paints, stains, adhesives, and sealants consistent with the Green Seal 11 standard or other applicable Green Seal standards (1 point);

(6) Tenant Services (Tenant Services shall include only direct costs (tenant services contract amount, supplies for services, internet connections, initial cost of computer equipment, etc.). Indirect costs such as overhead and utility allocations may not be included);

(A) $10.00 per Unit per month (10 points);

(B) $7.00 per Unit per month (5 points);

(C) $4.00 per Unit per month (3 points).

(7) Zoning appropriate for the proposed use or no zoning required for the intended use must be in place at the time of the Application submission date, which is listed on the Department's website for Applications submitted for waiting list and carryforward, in order to receive points (5 points).

(8) Proper Site Control (as defined in §33.3(25) of this chapter). Site control must be through the scheduled Board meeting inducement and at full application must be ninety (90) days from the date of the bond reservation with the option to extend through the scheduled TDHCA Board meeting. The potential expiration of site control does not warrant the application being presented to the TDHCA Board prior to the scheduled meeting. For Applications submitted for waiting list and carryforward all information must be correct at the time of the Application submission date, listed on the Department's website in order to receive points (5 points).

(9) Development Support/Opposition. Maximum net points of +24 to -24. Each letter will receive a maximum of +3 to -3. All letters received by 5:00 PM, seven (7) business days prior to the date of the Board meeting at which the Application will be considered for Applications submitted for waiting list and carryforward will be used in scoring. The letter must specifically indicate support or opposition otherwise the letter will be considered neutral.

(A) Texas State Senator and Texas State Representative (maximum +3 to -3 points per official);

(B) Presiding officer of the governing body of any municipality containing the Development and the elected district member of the governing body of the municipality containing the Development (maximum +3 to -3 points per official);

(C) Presiding officer of the governing body of the county containing the Development and the elected district member of the governing body of the county containing the Development (if the site is not in a municipality, these points will be doubled) (maximum +3 to -3 points per official);

(D) Local School District Superintendent and Presiding Officer of the Board of Trustees for the School district containing the Development (maximum +3 to -3 points per official).

(10) Proximity to Community Services/Amenities Community services/amenities within three (3) miles of the site. A map must be included with the Application showing a three (3) mile radius notating where the services/amenities are located. (Acquisition/Rehab developments will receive 1.5 points for each item in subparagraphs (A) - (O) of this paragraph).

(A) Full service grocery store or supermarket (1 point);

(B) Pharmacy (1 point);

(C) Convenience store/mini-market (1 point);

(D) Retail Facilities (Target, Wal-Mart, Home Depot, Bookstores, etc.) (1 point);

(E) Bank/Financial Institution (1 point);

(F) Restaurant (1 point);

(G) Indoor public recreation facilities (community center, civic center, YMCA, museum) (1 point);

(H) Outdoor public recreation facilities (park, golf course, public swimming pool) (1 point);

(I) Fire/Police Station (1 point);

(J) Medical Facilities (hospitals, minor emergency, medical offices) (1 point);

(K) Public Library (1 point);

(L) Public Transportation (1/2 mile from site) (1 point);

(M) Public School (only one school required for point and only eligible with general population developments) (1 point);

(N) Dry Cleaners (1 point);

(O) Family Video Rental (i.e. Blockbuster, Hollywood Video, Movie Gallery) (1 point).

(11) Proximity to Negative Features adjacent to or within 300 feet of any part of the Development site boundaries. A map must be included with the application showing where the feature is located. Developer must provide a letter stating there are none of the negative features listed in subparagraphs (A) - (F) of this paragraph within the stated area if that is correct. (maximum - 6 points)

(A) Junkyards (1 point deducted);

(B) Active Railways (excluding light rail) (1 point deducted);

(C) Heavy industrial/manufacturing plants (1 point deducted);

(D) Solid Waste/Sanitary Landfills (1 point deducted);

(E) Within the "fall line" of High Voltage Transmission Power Lines (1 point deducted); and/or

(F) Accident zones or clear zones for commercial or military airports (1 point deducted).

(12) Acquisition/Rehabilitation Developments will receive 30 points. This will include the demolition of old buildings and new construction of the same number of units if allowed by local codes or less units to comply with local codes (not to exceed 252 total units).

(13) Preservation Developments will receive 10 points. This includes rehabilitation proposals on properties which are nearing expiration of an existing affordability requirement within the next two years or for which there has been a rent restriction requirement in the past ten years. Evidence must be provided.

(14) Declared Disaster Areas. Applications will receive 7 points, if at the time the complete pre-application is submitted or at any time within the two-year period preceding the date of submission, the proposed Development site is located in an area declared to be a disaster under §418.014 of the Texas Government Code. This includes federal, state and Governor declared disaster areas.

(15) Developments in Census Tracts with No Other Existing Developments Supported by Tax Credits. Applications will receive 6 points if the proposed Development is located in a census tract in which there are no other existing developments that were awarded housing tax credits in the last five (5) years and 3 points if there are no other existing developments that were awarded housing tax credits in the last three (3) years. The applicant must provide evidence of the census tract in which the Development is located. These census tracts are outlined in the 2010 Housing Tax Credit Site Demographic Characteristics Report.

(16) Notary Public Services for Tenants. Applications will receive 1 point for this item (§2306.6710(b)(3)). To receive this point, the Applicant must submit a certification that the Development will provide notary public services to the tenants at no cost to the tenant. This provision will be included in the Land Use Restriction Agreement and Regulatory Agreement.

(f) Multiple Site Applications. For the purposes of scoring, applicants must submit the required information as outlined in the Pre-Application Submission Manual. Each individual property will be scored on its own merits and the final score will be determined based on an average of all of the individual scores.

(g) Financing Commitments. After approval by the Board of the inducement resolution, and as part of the submission of a final application, the Applicant will be solely responsible for making appropriate arrangements with financial institutions which are to be involved with the issuance of the Bonds or the financing of the Development, and to begin the process of obtaining firm commitments for financing from each of the financial institutions involved.

(h) Final Application. An Applicant who elects to proceed with submitting a final Application to the Department must submit the Volumes I and II of the Application, for Priority 1 and 2, prior to receipt of a reservation of allocation from the Texas Bond Review Board. For Priority 3 Applications the Volumes I and II must be submitted within fourteen (14) days of the reservation date from the Texas Bond Review Board. The Volume III of the Application and such supporting material as is required by the Department must be submitted at least sixty (60) days prior to the scheduled meeting of the Board at which the Development and the Bond issuance are to be considered, unless the Department directs the Applicant otherwise in writing. If the Applicant is applying for other Department funding then refer to the Rules for that program for Application submission requirements. The final application must adhere to the Department's QAP and Rules in effect for the program year for which the Bond and Housing Tax Credit applications are submitted. The Department may determine that supporting materials listed in the full application shall be provided subsequent to the final Application deadline in accordance with a schedule approved by the Department. Failure to provide any supporting materials in accordance with the approved schedule may be grounds for terminating the Application and returning the reservation to the Texas Bond Review Board.

(1) A Public Notification Sign shall be installed on the proposed Development site, regardless of Priority, within thirty (30) days of the Department's receipt of Volumes I and II. The applicant must certify to the fact that the sign was installed within thirty (30) days of Volume I and II submission and the date, time and location of the bond Tax Exempt Fiscal Responsibility Act (TEFRA) Public Hearing must be included on the sign no later than thirty (30) days prior to the scheduled public hearing date. The sign must be at least 4 feet by 8 feet in size and be located within 20 feet of, and facing, the main road adjacent to the site. The sign shall be continuously maintained on the site until the day the TDHCA Board takes final action on the Application for the Development. The information and lettering on the sign must meet the

minimum requirements identified in the Application. In areas where the Public Notification Sign is prohibited by local ordinance or code or restrictive covenant, an alternative to installing a Public Notification Sign and at the same required time, the Applicant shall, mail written notification to those addresses described in either subsection (d)(16)(A) - (E) and (F)(i)(III) of this section. This written notification must include the information otherwise required for the sign as provided in the Application. The final Application must include a map of the proposed Development Site and mark the distance required by local zoning ordinances, up to 1,000 feet, showing street names and addresses; a list of all addresses the notice was mailed to; an exact copy of the notice that was mailed; and a certification that the notice was mailed through the U.S. Postal Service and stating the date of mailing. If Public Notification Sign is prohibited by local ordinance or code or restrictive covenant, evidence of the applicable ordinance or code or restrictive covenant must be submitted in the Application. The Applicant must mail notice to any public official that changed from the submission of the pre-application to the submission of the final application and any neighborhood organization that is known and was not notified at the time of the pre-application submission. No additional notification is required unless the Applicant submitted a change in the Application that reflects a total Unit increase greater than 10%, an increase greater than 10% for any given AMFI, a decrease in the number of market rate units, or a change in the population being served (elderly, general population or transitional);

(2) Completed Uniform Application and Multifamily Rental Worksheets in the format required by the Department as posted to the Department's website.

(i) Administrative Deficiencies. If an Application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies. The Administrative Deficiency process may not be used by an Applicant or the Department to change the initial application proposal. Because the review for Eligibility, Threshold Criteria, and review for financial feasibility by the Department's Real Estate Analysis Division may occur separately, Administrative Deficiency requests may be made during any of these reviews. The Department staff will request clarification or correction in a deficiency notice in the form of an e-mail, or if an e-mail address is not provided in the Application, by facsimile, and a telephone call (only if there has not been confirmation of the receipt of the email within twenty-four (24) hours) to the Applicant and one other party identified by the Applicant in the Application advising that such a request has been transmitted. All Administrative Deficiencies shall be clarified or corrected to the satisfaction of the Department within five (5) business days. Failure to resolve all outstanding deficiencies within five business days will result in a penalty fee of $500 for each day the deficiency remains unresolved. Any Application with unresolved deficiencies after the 10th day from the issuance of the deficiency notice will be terminated. The Applicant will be responsible for the payment of any fees accrued pursuant to this section regardless of any termination pursuant to this section. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period. The Application will not be presented to the Board for consideration until all outstanding fees have been paid.

(j) Eligibility Criteria. The Department will evaluate the Development for eligibility at the time of pre-application, and at the time of final Application. If there are changes to the Application that have an adverse affect on the score and ranking order and that would have resulted in the Application being placed below another Application in the ranking, the Department will terminate the Application and return the reservation to the Texas Bond Review Board (with the exception of changes to deferred developer's fees and support or opposition points). The Development and the Applicant must satisfy the conditions set out in paragraphs (1) - (6) of this subsection in order for a Development to be considered eligible:

(1) The proposed Development must further meet the public purposes of the Department as identified in the Code;

(2) The proposed Development and the Applicant and its principals must satisfy the Department's Underwriting Rules and Guidelines (§1.32 of this title). The pre-application must include sufficient information for the Department to establish that the Underwriting Guidelines can be satisfied. The final Application will be thoroughly underwritten according to the Underwriting Rules and Guidelines (§1.32 of this title);

(3) The Development must not be located on a site determined to be unacceptable for the intended use by the Department;

(4) Any Development in which the Applicant or principals of the Applicant have an ownership interest must be found not to be in Material Non-Compliance under the compliance Rules in effect at the time of pre-application submission. Any corrective action documentation affecting the Material Non-compliance status score must be submitted to the Department no later than thirty (30) days prior to final application submission;

(5) Neither the Applicant nor any principals of the Applicant is, at the time of Application:

(A) barred, suspended, or terminated from procurement in a state or federal program or listed in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs; or

(B) has been convicted of a state or federal crime involving fraud, bribery, theft, misrepresentation, misappropriation of funds, or other similar criminal offenses within fifteen (15) years; or

(C) is subject to enforcement action under state or federal securities law, action by the NASD, subject to a federal tax lien, or the subject of an enforcement proceeding with any governmental entity; or

(D) neither applicant nor any principals of the applicant have a development under their ownership or control with a Material Non-compliance score as set out in the Department's Compliance Monitoring Policies and Procedures (Chapter 60 of this title); or

(E) otherwise disqualified or debarred from participation in any of the Department's programs; and

(6) Neither the Applicant nor any of its principals may have provided any fraudulent information, knowingly false documentation or other intentional or negligent misrepresentation in the Application or other information submitted to the Department.

(7) An application may include either the rehabilitation or new construction, or both the rehabilitation and new construction, of qualified residential rental facilities located at multiple sites and with respect to which 51% or more of the residential units are located:

(A) in a county with a population of less than 75,000; or

(B) in a county in which the median income is less than the median income for the state, provided that the units are located in that portion of the county that is not included in a metropolitan statistical area containing one or more projects that are proposed to be financed, in whole or in part, by an issuance of bonds. The number

of sites may be reduced as needed without affecting their status as a project for purposes of the application, provided that the final application for a reservation contains at least two sites (§1372.002).

(k) Bond Documents. After receipt of the final Application, bond counsel for the Department shall draft Bond documents which conform to the state and federal laws and regulations which apply to the transaction.

(l) Public Hearings; Board Decisions. For every Bond issuance, the Department will hold a public hearing in accordance with §2306.0661, Texas Government Code and §147(f) of the Code, in order to receive comments from the public pertaining to the Development and the issuance of the Bonds. The Applicant or member of the Development team must be present and will be responsible for conducting a brief presentation on the proposed Development and providing handouts at the hearing that should contain at a minimum, a description of the Development, maximum rents and income restrictions. If the proposed Development is an acquisition/rehabilitation then the presentation should include the scope of work that will be done to the property. All handouts must be submitted to the Department for review at least two (2) days prior to the public hearing. Publication of all notices required for the public hearing shall be at the sole expense of the Applicant. The Board's decisions on approvals of proposed Developments will consider all relevant matters. Any topics or matters, alone or in combination, may or may not determine the Board's decision. The Department's Board will consider the following topics in relation to the approval of a proposed Development:

(1) The developer market study;

(2) The location;

(3) The compliance history of the developer;

(4) The financial feasibility;

(5) The appropriateness of the Development's size and configuration in relation to the housing needs of the community in which the Development is located;

(6) The Development's proximity to other low income Developments;

(7) The availability of adequate public facilities and services;

(8) The anticipated impact on local school districts;

(9) Zoning and other land use considerations;

(10) Any matter considered by the Board to be relevant to the approval decision and in furtherance of the Department's purposes; and

(11) Other good cause as determined by the Board.

(m) Approval of the Bonds.

(1) Subject to the timely receipt and approval of commitments for financing, an acceptable evaluation for eligibility, the satisfactory negotiation of Bond documents, and the completion of a public hearing, the Board, upon presentation by the Department's staff, will consider the approval of the Bond issuance, final Bond documents and in the instance of privately placed Bonds, the pricing of the Bonds. The process for appeals and grounds for appeals may be found under §1.7 and §1.8 of this title. The Department's conduit housing transactions will be processed in accordance with 34 TAC Part 9, Chapter 181, Subchapter A (the Texas Bond Review Board rules) and Chapter 1372, Texas Government Code. The Bond issuance must receive an approving opinion from the Department's bond counsel with respect to the legality and validity of the Bonds and the security therefore, and in the case of tax-exempt Bonds, with respect to the excludability from gross income for federal income tax purposes of interest on the Bonds.

(2) Alternative Dispute Resolution Policy. The Department encourages use of Alternative Dispute Resolution methods as outlined in §1.17 of this title.

(n) Local Permits. Prior to the closing of the Bonds, all necessary approvals, including building permits, from local municipalities, counties, or other jurisdictions with authority over the Development must have been obtained or evidence that the permits are obtainable subject only to payment of certain fees must be provided to the Department.

(o) Closing. If there are changes to the Application prior to closing that have an adverse effect on the score and ranking order that would have resulted in the Application being placed below another Application in the ranking, the Department will terminate the Application and return the reservation to the Texas Bond Review Board (with the exception of changes to deferred developer's fees and support or opposition points). Once all approvals have been obtained and Bond documents have been finalized to the respective parties' satisfaction, the Bond transaction will close. Any outstanding Housing Trust Fund Pre-Development loans for the proposed Development site must be paid in full at the time the bond transaction is closed. All Applicants are subject to §1.20(g) of this title. Upon satisfaction of all conditions precedent to closing, the Department will issue Bonds in exchange for payment thereof. The Department will then loan the proceeds of the Bonds to the Applicant and disbursements of the proceeds may begin.

§33.7. Regulatory and Land Use Restrictions.

(a) Filing and Term of LURA. A Regulatory and Land Use Restriction Agreement or other similar instrument (the "LURA"), will be filed in the property records of the county in which the Development is located for each Development financed from the proceeds of Bonds issued by the Texas Department of Housing and Community Affairs (the "Department"). For Developments involving new construction, the term of the LURA will be the longer of thirty (30) years, the period of guaranteed affordability or the period for which Bonds are outstanding. For the financing of an existing Development, the term of the LURA will be the longer of the longest period which is economically feasible in accordance with the Act, or the period for which Bonds are outstanding.

(b) Development Occupancy. The LURA will specify occupancy restrictions for each Development based on the income of its tenants, and will restrict the rents that may be charged for Units occupied by tenants who satisfy the specified income requirements. Pursuant to §2306.269, Texas Government Code, the LURA will prohibit a Development Owner from excluding an individual or family from admission to the Development because the individual or family participates in the housing choice voucher program under §8, United States Housing Act of 1937 (the "Housing Act"), and from using a financial or minimum income standard for an individual or family participating in the voucher program that requires the individual or family to have a monthly income of more than two and one half (2.5) times the individual's or family's share of the total monthly rent payable to the Development Owner of the Development. Development occupancy requirements must be met on or prior to the date on which Bonds are issued unless the Development is under construction. Adequate substantiation that the occupancy requirements have been met, in the sole discretion of the Department, must be provided prior to closing. Occupancy requirements exclude Units for managers and maintenance personnel that are reasonably required by the Development.

(c) Set Asides.

(1) Developments which are financed from the proceeds of Private Activity Bonds or from the proceeds of Qualified 501(c)(3) Bonds must be restricted under one of the following two minimum set-asides:

(A) at least 20% of the Units within the Development that are available for occupancy shall be occupied or held vacant and available for occupancy at all times by persons or families whose income does not exceed 50% of the area median income; or

(B) at least 40% of the Units within the Development that are available for occupancy shall be occupied or held vacant and available for occupancy at all times by persons or families whose income does not exceed 60% of the area median income.

(2) The Development Owner must designate at the time of Application which of the two set-asides will apply to the Development and must also designate the selected priority for the Development in accordance with §1372.0321, Texas Government Code. Units intended to satisfy set-aside requirements must be distributed evenly throughout the Development, and must include a reasonably proportionate amount of each type of Unit available in the Development.

(3) No tenant qualifying under either of the set-asides shall be denied continued occupancy of a Unit in the Development because, after commencement of such occupancy, such tenant's income increases to exceed the qualifying limit; provided, however, that, should a tenant's income, as of the most recent determination thereof, exceed 140% of the then applicable income limit and such tenant constitutes a portion of the set-aside requirement of this section, then such tenant shall only continue to qualify for so long as no Unit of comparable or smaller size is rented to a tenant that does not qualify as a Low-Income Tenant (Required federal set-aside requirements).

(d) Global Income Requirement. All of the Units that are available for occupancy in Developments financed from the proceeds of Private Activity Bonds or from the proceeds of Qualified 501(c)(3) Bonds shall be occupied or held vacant (in the case of new construction) and available for occupancy at all times by persons or families whose income does not exceed 140% of the area median income for a four-person household.

(e) Qualified 501(c)(3) Bonds. Developments which are financed from the proceeds of Qualified 501(c)(3) Bonds are further subject to the restriction that at least 75% of the Units within the Development that are available for occupancy shall be occupied (or, in the case of new construction, held vacant and available for occupancy until such time as initial lease-up is complete) at all times by individuals and families of Low Income (less than or equal to 80% of AMFI).

(f) Taxable Bonds. The occupancy requirements for Developments financed from the issuance of taxable Bonds will be negotiated, considered and approved by the Department on a case by case basis.

(g) Fair Housing. All Developments financed by the Department must comply with the Fair Housing Act which prohibits discrimination in the sale, rental, and financing of dwellings based on race, color, religion, sex, national origin, familial status, and disability. The Fair Housing Act also mandates specific design and construction requirements for multifamily housing built for first occupancy after March 13, 1991, in order to provide accessible housing for individuals with disabilities.

(h) Tenant Services. The LURA will require that the Development Owner offer a variety of services for residents of the Development through a Tenant Services Program Plan which is subject to annual approval by the Department.

(i) Land Use Restriction Agreement. Requirements as defined in Chapter 60, Subchapter A of this title.

§33.8. Fees.

(a) Pre-Application Fees. The Applicant is required to submit, at the time of pre-application, the following fees: $1,000 (payable to TDHCA), $2,000 (payable to Vinson & Elkins, the Department's Bond Counsel) and $5,000 (payable to the Texas Bond Review Board (BRB)). These fees cover the costs of pre-application review and filing fees to the BRB. The Texas Department of Housing and Community Affairs (the "Department") shall set fees to be paid by the Applicant in order to cover the costs of pre-application review, Application and Development review, the Department's expenses in connection with providing financing for a Development, and as required by law. (§1372.006(a), Texas Government Code.)

(b) Application and Issuance Fees. At the time of full application the Applicant is required to submit a tax credit application fee of $30/unit and $10,000 for the bond application fee (for multiple site Applications $10,000 or $30/unit, whichever is greater, for the bond application fee.) At the closing of the bonds the following fees are required: an issuance fee equal to 50 basis points (0.005) of the issued bond amount, administration fee equal to 20 basis points (0.002) and a Private Activity Bond compliance fee equal to $25/unit and a tax credit compliance fee equal to $40/unit. For refunding Applications the Application fee will be $10,000 unless the refunding is not required to have a TEFRA public hearing, in which case the fee will be $5,000.

(c) Annual Administration, Portfolio Management and Compliance, and Asset Management Fees. The Department shall set ongoing fees to be paid by Development Owners to cover the Department's costs of administering the Bonds, portfolio management and compliance with the program requirements applicable to each Development and asset management requirements, if applicable.

(1) Administration. The annual administration fee is paid in arrears and is equal to 10 basis points (0.001) of the outstanding bond amount beginning three years from the closing date. These fees are paid as long as the bonds are outstanding.

(2) Compliance. The annual tax credit compliance fee is paid in advance (for the duration of the compliance or affordability period) and is equal to $40/unit beginning two years from the closing date on the bonds. The fee will be collected, retroactively if applicable, beginning with the first year of the credit period. The invoice must be paid prior to the issuance of form 8609. Subsequent anniversary dates on which the compliance monitoring fee payments are due shall be determined by the month the first building is placed in service. The Private Activity Bond compliance fee is paid in advance at closing (for as long as the bonds are outstanding) and is equal to $25/unit beginning two years from the closing date on the bonds for payment to be applied to the third year following closing. Compliance fees may be adjusted from time to time by the Department.

(3) Asset Management. The asset management fee is paid in advance and is equal to $25/unit beginning two years from the closing date on the bonds. This fee is based on voluntary participation in the asset management program. Those who elect to participate are encouraged to contact the Texas State Affordable Housing Corporation (TSAHC) for information on billing and services offered.

§33.9. Waiver of Rules.

Provided all requirements of the Act, the Code, and any other applicable law are met, the Board may waive any one or more of the Rules set forth in §§33.3 - 33.8 of this chapter relating to the Multifamily Housing Revenue Bond Program in order to further the purposes and

the policies of Chapter 2306, Texas Government Code; to encourage the acquisition, construction, reconstruction, or rehabilitation of a Development that would provide decent, safe, and sanitary housing, including, but not limited to, providing such housing in economically depressed or blighted areas, or providing housing designed and equipped for Persons with Special Needs; or for other good cause, as determined by the Board.

§33.10. No Discrimination.

The Texas Department of Housing and Community Affairs (the "Department") and its staff or agents, Applicants, Development Owners, and any participants in the Program shall not discriminate under this Program against any person or family on the basis of race, creed, national origin, age, religion, handicap, family status, or sex, or against persons or families on the basis of their having minor children, except that nothing herein shall be deemed to preclude a Development Owner from selecting tenants with Special Needs, or to preclude a Development Owner from selecting tenants based on income in renting Units to comply with the set asides under the provisions of this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 11, 2009.

TRD-200904003
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 475-3916

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CHAPTER 50. 2008 HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§50.1 - 50.23

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 50, §§50.1 - 50.23, concerning the 2008 Housing Tax Credit Program Qualified Allocation Plan and Rules. The sections are proposed to be repealed in order to enact new sections.

Michael Gerber, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals.

Mr. Gerber has also determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be more efficient communications with those who conduct regular business with the Department which will enhance the State's ability to provide decent, safe and affordable housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

Public hearings will be held across the state between September 18, 2009 through October 26, 2009 to receive public input on this proposal. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2010 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 26, 2009.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt or repeal rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed repeal.

§50.1. Purpose and Authority; Program Statement; Allocation Goals.

§50.2. Coordination with Rural Agencies.

§50.3. Definitions.

§50.4. State Housing Credit Ceiling.

§50.5. Ineligibility; Disqualification and Debarment; Certain Applicant and Development Standards; Representation by Former Board Member or Other Person; Due Diligence, Sworn Affidavit; Appeals and Administrative Deficiencies for Ineligibility, Disqualification and Debarment.

§50.6. Site and Development Restrictions: Floodplain; Ineligible Building Types; Scattered Site Limitations; Credit Amount; Limitations on the Size of Developments; Limitations on Rehabilitation Costs; Unacceptable Sites; Appeals and Administrative Deficiencies for Site and Development Restrictions.

§50.7. Regional Allocation Formula; Set-Asides; Redistribution of Credits.

§50.8. Pre-Applications for Competitive Housing Tax Credits: Submission; Communication with Departments Staff; Evaluation Process; Threshold Criteria and Review; Results. (§2306.6704).

§50.9. Application: Submission; Ex Parte Communications; Adherence to Obligations; Evaluation Process for Competitive Applications Under the State Housing Credit Ceiling; Evaluation Process for Tax-Exempt Bond Development Applications; Evaluation Process for Rural Rescue Applications Under the 2009 Credit Ceiling; Experience Pre-Certification Procedures; Threshold Criteria; Selection Criteria; Tiebreaker Factors; Staff Recommendations.

§50.10. Board Decisions; Waiting List; Forward Commitments.

§50.11. Required Application Notifications, Receipt of Public Comment, and Meetings with Applicants; Viewing of Pre-Applications and Applications; Confidential Information.

§50.12. Tax-Exempt Bond Developments: Filing of Applications; Applicability of Rules; Supportive Services; Financial Feasibility Evaluation; Satisfaction of Requirements.

§50.13. Commitment and Determination Notices; Agreement and Election Statement; Documentation Submission Requirements.

§50.14. Carryover; 10% Test; Commencement of Substantial Construction.

§50.15. LURA, Cost Certification.

§50.16. Housing Credit Allocations.

§50.17. Board Reevaluation, Appeals Process; Provision of Information or Challenges Regarding Applications; Amendments; Housing Tax Credit and Ownership Transfers; Sale of Tax Credit Properties; Withdrawals; Cancellations; Alternative Dispute Resolution.

§50.18. Compliance Monitoring and Material Noncompliance.

§50.19. Department Records; Application Log; IRS Filings.

§50.20. Program Fees; Refunds; Public Information Requests; Adjustments of Fees and Notification of Fees; Extensions; Penalties.

§50.21. Manner and Place of Filing All Required Documentation.

§50.22. Waiver and Amendment of Rules.

§50.23. Deadlines for Allocation of Housing Tax Credits. (§2306.6724).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904035
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 475-3916

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CHAPTER 50. 2010 QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§50.1 - 50.23

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 50, §§50.1 - 50.23, concerning the 2010 Qualified Allocation Plan and Rules. The new sections are proposed in order to implement changes that will improve the 2010 Housing Tax Credit Program.

Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections as proposed.

Mr. Gerber has also determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the sections will be more efficient communications with those who conduct regular business with the Department which will enhance the State's ability to provide decent, safe and affordable housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Public hearings will be held across the state between September 18, 2009 through October 26, 2009 to receive public input on these rules. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2010 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 469-9606. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 26, 2009.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed new sections.

§50.1. Purpose and Authority; Program Statement; Allocation Goals.

(a) Purpose and Authority. The rules in this chapter apply to the allocation by the Texas Department of Housing and Community Affairs (the "Department") of Housing Tax Credits authorized by applicable federal income tax laws. The Internal Revenue Code of 1986, §42 (the "Code"), as amended, provides for credits against federal income taxes for owners of qualified low-income rental housing Developments. That section provides for the allocation of the available tax credit amount by state housing credit agencies. Pursuant to Chapter 2306, Subchapter DD, of the Texas Government Code, the Department is authorized to make Housing Credit Allocations for the State of Texas. As required by the Internal Revenue Code, §42(m)(1), the Department developed this Qualified Allocation Plan (QAP) which is set forth in §§50.1 - 50.23 of this chapter. Sections in this chapter establish procedures for applying for and obtaining an allocation of Housing Tax Credits, along with ensuring that the proper Threshold Criteria, Selection Criteria, priorities and preferences are followed in making such allocations.

(b) Program Statement. The Department shall administer the program to encourage the development and preservation of appropriate types of rental housing for households that have difficulty finding suitable, accessible, affordable rental housing in the private marketplace; maximize the number of suitable, accessible, affordable residential rental units added to the state's housing supply; prevent losses for any reason to the state's supply of suitable, accessible, affordable residential rental units by enabling the Rehabilitation of rental housing or by providing other preventive financial support; and provide for the participation of for-profit organizations and provide for and encourage the participation of nonprofit organizations in the acquisition, development and operation of accessible affordable housing developments in rural and urban communities. (§2306.6701)

(c) Allocation Goals. It is the policy of this Department and the Board, as expressed through these provisions, to encourage diversity through broad geographic allocation of tax credits within the state, and in accordance with the regional allocation formula; to promote maximum utilization of the available tax credit amount; and to allocate credits among as many different entities as practicable without diminishing the quality of the housing that is being built. The processes and criteria utilized to implement this policy are described in §§50.7, 50.8 and 50.9 of this chapter, without in any way limiting the effect or applicability of all other provisions of this title. (General Appropriation Act, Article VII, Rider 8(e))

§50.2. Coordination with Rural Agencies.

To ensure maximum utilization and optimum geographic distribution of tax credits in rural areas, and to provide for sharing of information, efficient procedures, and fulfillment of Development requirements

in rural areas, the Department will coordinate on existing, Rehabilitation, and New Construction housing Developments financed by TRDO-USDA; and will administer the Rural Regional Allocation with the Texas Department of Rural Affairs (TDRA), formerly known as the Office of Rural and Community Affairs. Through participation in hearings and meetings, TDRA will assist in developing all Threshold, Selection and Underwriting Criteria applied to Applications eligible for the Rural Regional Allocation. The Criteria will be approved by that Agency. To ensure that the Rural Regional Allocation receives a sufficient volume of eligible Applications, the Department and TDRA shall coordinate the implementation outreach, training, and rural area capacity building efforts. (§2306.6723)

§50.3. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Adaptive Reuse--The renovation or rehabilitation of an existing non-residential building or structure (e.g., school, warehouse, office, hospital, etc.), including physical alterations that modify the building's previous or original intended use. If any Units are built outside the original building footprint or foundation, the Development will be considered New Construction and not Adaptive Reuse. A clubhouse or non-residential building may be outside the original footprint or foundation and still be considered Adaptive Reuse. The number of floors or stories may be increased in a building as long as the total number of Units for the Development does not exceed 80 Units in a Rural Area or 252 Units in an Urban Area.

(2) Administrative Deficiencies--As referenced in §§50.5, 50.6, 50.8 and 50.9 of this chapter, is defined as information requested by the Department that is required to clarify or correct inconsistencies in an Application. An Administrative Deficiency is a deficiency or inconsistency, in the Department's reasonable judgment, that may be cured by supplemental information or explanation which will not necessitate a substantial reassessment or re-evaluation of the Application.

(3) Affiliate--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with any other Person, and specifically shall include parents or subsidiaries. Affiliates also include all General Partners, Special Limited Partners and Principals with an ownership interest unless the entity is an experienced Developer as described in §50.9(h)(9)(D) of this chapter.

(4) Agreement and Election Statement--A document in which the Development Owner elects, irrevocably, to fix the Applicable Percentage with respect to a building or buildings, as that in effect for the month in which the Department and the Development Owner enter into a binding agreement as to the housing credit dollar amount to be allocated to such building or buildings.

(5) Applicable Fraction--The fraction used to determine the Qualified Basis of the qualified low-income building, which is the smaller of the Unit fraction or the floor space fraction, all determined as provided in the Code, §42(c)(1).

(6) Applicable Percentage--The percentage used to determine the amount of the Housing Tax Credit for any Development (New Construction, Reconstruction, and/or Rehabilitation), as defined more fully in the Code, §42(b).

(A) For purposes of the Application, the Applicable Percentage will be projected at:

(i) the greater of 9% or the current applicable percentage for 70% present value credits for new buildings, pursuant to §42(b) of the Code for the month in which the Application is submitted to the Department; or

(ii) 15 basis points over the current applicable percentage for 30% present value credits associated with acquisition and with qualified Tax-Exempt Bond Developments, pursuant to §42(b) of the Code for the month in which the Application is submitted to the Department.

(B) For purposes of making a credit recommendation at any other time, the Applicable Percentage will be based in order of priority on:

(i) The percentage indicated in the Agreement and Election Statement, if executed; or

(ii) The actual applicable percentage as determined by the Code, §42(b), if all or part of the Development has been placed in service and for any buildings not placed in service the percentage will be the actual percentage as determined by the Code, §42(b) for the most current month; or

(iii) The percentage as calculated in subparagraph (A) of this paragraph if the Agreement and Election Statement has not been executed and no buildings have been placed in service.

(7) Applicant--Any Person or Affiliate of a Person who files a Pre-Application or an Application with the Department requesting a Housing Credit Allocation. (§2306.6702)

(8) Application--An application, in the form prescribed by the Department, filed with the Department by an Applicant, including any exhibits or other supporting material. (§2306.6702)

(9) Application Acceptance Period--That period of time during which Applications for a Housing Credit Allocation from the State Housing Credit Ceiling may be submitted to the Department, December 7, 2009 through March 1, 2010, as more fully described in §§50.8 - 50.12 of this chapter. For Tax-Exempt Bond Developments this period is the date the Volumes 1 and 2 are submitted or the date the reservation is issued by the Texas Bond Review Board, whichever is earlier.

(10) Application Round--The period beginning on the date the Department begins accepting Applications and continuing until all available Housing Tax Credits are allocated, but not extending past the last day of the calendar year. (§2306.6702) For purposes of this section, this definition applies to Housing Tax Credits allocated with the State Housing Credit Ceiling.

(11) Application Submission Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for the filing of Pre-Applications and Applications for Housing Tax Credits.

(12) Area--

(A) The geographic area contained within the boundaries of:

(i) An incorporated place; or

(ii) Census Designated Place (CDP) as established by the U.S. Census Bureau for the most recent Decennial Census.

(B) For Developments located outside the boundaries of an incorporated place or CDP, the Development shall take up the Area characteristics of the incorporated place or CDP whose boundary is nearest to the Development site.

(13) Area Median Gross Income (AMGI)--Area median gross household income, as determined for all purposes under and in accordance with the requirements of the Code, §42.

(14) At-Risk Development--A Development that: (§2306.6702)

(A) Has received the benefit of a subsidy in the form of a below-market interest rate loan, interest rate reduction, rental subsidy, Section 8 housing assistance payment, rental supplement payment, rental assistance payment, or equity incentive under at least one of the following federal laws, as applicable:

(i) Sections 221(d)(3) and (5), National Housing Act (12 U.S.C. §17151);

(ii) Section 236, National Housing Act (12 U.S.C. §1715z-1);

(iii) Section 202, Housing Act of 1959 (12 U.S.C. §1701q);

(iv) Section 101, Housing and Urban Development Act of 1965 (12 U.S.C. §1701s);

(v) The Section 8 Additional Assistance Program for housing Developments with HUD-Insured and HUD-Held Mortgages administered by the United States Department of Housing and Urban Development;

(vi) The Section 8 Housing Assistance Program for the Disposition of HUD-Owned Projects administered by the United States Department of Housing and Urban Development;

(vii) Sections 514, 515, and 516, Housing Act of 1949 (42 U.S.C. §§1484, 1485, and 1486); or

(viii) Section 42, of the Internal Revenue Code of 1986 (26 U.S.C. §42); and

(B) Is subject to the following conditions:

(i) The stipulation to maintain affordability in the contract granting the subsidy is nearing expiration (expiration will occur within two calendar years of July 31 of the year the Application is submitted); or

(ii) The federally insured mortgage on the Development is eligible for prepayment or is nearing the end of its mortgage term (the term will end within two (2) calendar years of July 31 of the year the Application is submitted).

(C) An Application for a Development that includes the demolition of the existing Units which have received the financial benefit described in subparagraph (A) of this paragraph will not qualify as an At-Risk Development unless the redevelopment will include the same site.

(D) Developments must be at risk of losing all affordability from all of the financial benefits available on the Development, provided such benefit constitutes a subsidy, described in subparagraph (A) of this paragraph on the site. However, Developments that have an opportunity to retain or renew any of the financial benefit described in subparagraph (A) of this paragraph must retain or renew all possible financial benefit to qualify as an At-Risk Development.

(E) Nearing expiration on a requirement to maintain affordability includes Developments eligible to request a qualified contract under §42 of the Code. Evidence must be provided in the form of a copy of the recorded LURA, the first years' IRS Forms 8609 for all buildings showing Part II completed and, if applicable, documentation from the original application regarding the right of first refusal.

(15) Bedroom--A portion of a Unit which is no less than 100 square feet; has no width or length less than 8 feet; is self contained with a door (or the unit is a "loft" design with an open sleeping area of 100 square feet or more); has at least one window that provides exterior access; and has at least one closet that is not less than 2 feet deep and 3 feet wide and high enough to accommodate 5 feet of hanging space. A den, study or other similar space that could reasonably function as a bedroom and meets this definition is considered a bedroom.

(16) Board--The governing Board of the Department. (§2306.004)

(17) Carryover Allocation--An allocation of current year tax credit authority by the Department pursuant to the provisions of the Code, §42(h)(1)(C) and Treasury Regulations, §1.42-6.

(18) Carryover Allocation Document--A document issued by the Department, and executed by the Development Owner, pursuant to §50.14(a) of this chapter.

(19) Carryover Allocation Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for filing Carryover Allocation requests.

(20) Code--The Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued thereunder by the United States Department of the Treasury or the Internal Revenue Service.

(21) Colonia--A geographic Area that is located in a county some part of which is within 150 miles of the international border of this state, that consists of 11 or more dwellings that are located in close proximity to each other in an area that may be described as a community or neighborhood, and that (§2306.581):

(A) Has a majority population composed of individuals and families of low-income and very low-income, based on the federal Office of Management and Budget poverty index, and meets the qualifications of an economically distressed Area under §17.921, Texas Water Code; or

(B) Has the physical and economic characteristics of a colonia, as determined by the Department.

(22) Commitment Notice--A notice issued by the Department to a Development Owner pursuant to §50.13 of this chapter and also referred to as the "commitment."

(23) Community Revitalization Plan--A published document under any name, approved and adopted by the local Governing Body by ordinance, resolution, or vote that targets specific geographic areas for revitalization and development of residential developments.

(24) Competitive Housing Tax Credits--Tax credits available from the State Housing Credit Ceiling.

(25) Compliance Period--With respect to a building, the period of fifteen (15) taxable years, beginning with the first taxable year of the Credit Period pursuant to the Code, §42(i)(1).

(26) Control (including the terms "Controlling," "Controlled by," and/or "under common Control with")--The possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership of voting securities, by contract or otherwise, including specifically ownership of more than 50% of the General Partner interest in a limited partnership, or designation as a managing member of a limited liability company.

(27) Cost Certification Procedures Manual--The manual produced, and amended from time to time, by the Department which sets forth procedures, forms, and guidelines for filing requests for IRS Form(s) 8609 for Developments placed in service under the Housing Tax Credit Program.

(28) Credit Period--With respect to a building within a Development, the period of ten (10) taxable years beginning with the taxable year the building is placed in service or, at the election of the Development Owner, the succeeding taxable year, as more fully defined in the Code, §42(f)(1).

(29) Department--The Texas Department of Housing and Community Affairs, an agency of the State of Texas, established by Chapter 2306, Texas Government Code, including Department employees and/or the Board. (§2306.004)

(30) Determination Notice--A notice issued by the Department to the Development Owner of a Tax-Exempt Bond Development which states that the Development may be eligible to claim Housing Tax Credits without receiving an allocation of Housing Tax Credits from the State Housing Credit Ceiling because it satisfies the requirements of this QAP; sets forth conditions which must be met by the Development before the Department will issue the IRS Form(s) 8609 to the Development Owner; and specifies the Department's determination as to the amount of tax credits necessary for the financial feasibility of the Development and its viability as a rent restricted Development throughout the extended use period. (§42(m)(1)(D))

(31) Developer--Any Person entering into a contract with the Development Owner to provide development services with respect to the Development and receiving a fee for such services (which fee cannot exceed the limits identified in §50.9(d)(6)(B) of this chapter) and any other Person receiving any portion of such fee, whether by subcontract or otherwise.

(32) Development--A proposed qualified and/or approved low-income housing project, as defined by the Code, §42(g), for Adaptive Reuse, New Construction, reconstruction, or Rehabilitation, that consists of one or more buildings containing multiple Units, and that, if the Development shall consist of multiple buildings, is financed under a common plan and is owned by the same Person for federal tax purposes, and the buildings of which are either:

(A) Located on a single site or contiguous site; or

(B) Located on scattered sites and contain only rent-restricted units. (§2306.6702)

(33) Development Consultant--Any Person (with or without ownership interest in the Development) who provides professional services relating to the filing of an Application, Carryover Allocation Document, and/or cost certification documents.

(34) Development Funding--

(A) A loan or grant; or

(B) An in-kind contribution, including a donation of real property, a fee waiver for a building permit or for water or sewer service, or a similar contribution that:

(i) Provides an economic benefit; and

(ii) Results in a quantifiable cost reduction for the applicable Development. (§2306.004(4-a))

(35) Development Owner--Any Person, General Partner, or Affiliate of a Person who owns or proposes a Development or expects to acquire Control of a Development under a purchase contract or ground lease approved by the Department. (§2306.6702)

(36) Development Site--The area, or if scattered site areas, for which the Development is proposed to be located and which is to be under the Applicant's control pursuant to §50.9(h)(7)(A) of this chapter.

(37) Development Team--All Persons or Affiliates thereof that play a role in the Development, construction, Rehabilitation, management and/or continuing operation of the subject Property, which will include any Development Consultant and Guarantor.

(38) Disaster Area--An area that has been declared as a disaster pursuant to §418.014 of the Texas Government Code.

(39) Economically Distressed Area--Consistent with §17.921 of the Texas Water Code, an Area in which:

(A) Water supply or sewer services are inadequate to meet minimal needs of residential users as defined by Texas Water Development Board rules;

(B) Financial resources are inadequate to provide water supply or sewer services that will satisfy those needs; and

(C) An established residential subdivision was located on June 1, 1989, as determined by the Texas Water Development Board.

(40) Eligible Basis--With respect to a building within a Development, the building's Eligible Basis as defined in the Code, §42.

(41) Executive Award and Review Advisory Committee ("The Committee")--A Departmental committee as set forth in Chapter 2306 of the Texas Government Code. (§2306.1112)

(42) Existing Residential Development--Any Development Site which contains four (4) or more existing residential Units at the time the Volume I is submitted to the Department.

(43) Extended Housing Commitment--An agreement between the Department, the Development Owner and all successors in interest to the Development Owner concerning the extended housing use of buildings within the Development throughout the extended use period as provided in the Code, §42(h)(6). The Extended Housing Commitment with respect to a Development is expressed in the LURA applicable to the Development.

(44) General Contractor--One who contracts for the construction or Rehabilitation of an entire Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the subcontractors. This party may also be referred to as the "contractor."

(45) General Partner--That partner, or collective of partners, identified as the general partner of the partnership that is the Development Owner and that has general liability for the partnership. In addition, unless the context shall clearly indicate the contrary, if the Development Owner in question is a limited liability company, the term "General Partner" shall also mean the managing member or other party with management responsibility for the limited liability company.

(46) Governing Body--The elected body of public officials, responsible for the enactment, implementation and enforcement of local rules and the implementation and enforcement of applicable laws for its respective jurisdiction.

(47) Governmental Entity--Includes federal or state agencies, departments, boards, bureaus, commissions, authorities, and political subdivisions, special districts, tribal governments and other similar entities.

(48) Governmental Instrumentality--A legal entity such as a housing authority of a city or county, a housing finance corporation,

or a municipal utility, or a tribal designated housing entity, which is created by a local political subdivision under statutory authority and which instrumentality is authorized to transact business for the political subdivision.

(49) Grant--Financial assistance that is awarded in the form of money to a housing sponsor or Development for a specific purpose and that is not required to be repaid. A Grant includes a forgivable loan. (§2306.004)

(50) Guarantor--Any Person that provides, or is anticipated to provide, a guaranty for the equity or debt financing for the Development.

(51) High Opportunity Area--An area that includes:

(A) Existing major bus transfer centers and/or regional or local commuter rail transportation stations that are accessible to all residents including Persons with Disabilities; or

(B) A census tract which has an AMGI that is higher than the AMGI of the county or place in which the census tract is located; or

(C) A school attendance zone that has an academic rating of "Exemplary" or "Recognized" rating (as determined by the Texas Education Agency) as of the first day of the Application Submission Acceptance Period; or

(D) A census tract that has no greater than 10% poverty population according to the most recent census data (these census tracts are designated in the 2010 Housing Tax Credit Site Demographic Characteristics Report).

(52) Historically Underutilized Businesses (HUB)--Any entity defined as a historically underutilized business with its principal place of business in the State of Texas in accordance with Chapter 2161, Texas Government Code.

(53) Housing Credit Agency--A Governmental Entity charged with the responsibility of allocating Housing Tax Credits pursuant to the Code, §42. For the purposes of this chapter, the Department is the sole "Housing Credit Agency" of the State of Texas.

(54) Housing Credit Allocation--An allocation by the Department to a Development Owner for a specific Application of Housing Tax Credits in accordance with the provisions of this chapter.

(55) Housing Credit Allocation Amount--With respect to a Development or a building within a Development, that amount the Department determines to be necessary for the financial feasibility of the Development and its viability as a Development throughout the affordability period and which it allocates to the Development.

(56) Housing Tax Credit ("tax credits")--A tax credit allocated, or for which a Development may qualify, under the Housing Tax Credit Program, pursuant to the Code, §42. (§2306.6702)

(57) HUD--The United States Department of Housing and Urban Development, or its successor.

(58) Ineligible Building Types--Those Developments which are ineligible, pursuant to this QAP, for funding under the Housing Tax Credit Program, as follows:

(A) Hospitals, nursing homes, trailer parks, dormitories (or other buildings that will be predominantly occupied by students) or other facilities which are usually classified as transient housing (other than certain specific types of transitional housing for the homeless and Single Room Occupancy units, as provided in the Code, §42(i)(3)(B)(iii) and (iv)) are not eligible. However, structures formerly used as hospitals, nursing homes or dormitories are eligible for Housing Tax Credits if the Development involves the conversion of the building to a non-transient multifamily residential Development. Refer to IRS Revenue Ruling 98-47 for clarification of assisted living;

(B) Any Qualified Elderly Development or age restricted buildings in Intergenerational Housing Developments of two stories or more that does not include elevator service for any Units or living space above the first floor;

(C) Any Qualified Elderly Development or age restricted buildings in Intergenerational Housing Developments with any Units having more than two bedrooms with the exception of up to three employee Units reserved for the use of the manager, maintenance, and/or security officer. These employee Units must be specifically designated as such;

(D) Any Development with building(s) with four or more stories that does not include an elevator;

(E) Any Qualified Elderly Development or age restricted buildings in Intergenerational Housing Developments proposing more than 70% two-bedroom Units;

(F) Any Development that violates the Integrated Housing Rule of the Department, §1.15 of this title;

(G) Any Development located in an Urban Area involving any New Construction of additional Units (other than a Qualified Elderly Development, a Development composed entirely of single family dwellings, and certain specific types of transitional housing for the homeless and Single Room Occupancy units, as provided in the Code, §42(i)(3)(B)(iii) and (iv)) in which any of the designs in clauses (i) - (iv) of this subparagraph are proposed. For Applications involving a combination of single family detached dwellings and multifamily dwellings, the percentages in this subparagraph do not apply to the single family detached dwellings, but they do apply to the multifamily dwellings. For Intergenerational Housing Applications, the percentages in this subparagraph do not apply to buildings that are restricted by the age requirements of a Qualified Elderly Development, but they do apply to the other multifamily buildings. An Application may reflect a total of Units for a given bedroom size greater than the percentages in clauses (i) - (iv) of this subparagraph to the extent that the increase is only to reach the next highest number divisible by four:

(i) More than 30% of the total Units are one bedroom Units; or

(ii) More than 55% of the total Units are two bedroom Units; or

(iii) More than 40% of the total Units are three bedroom Units; or

(iv) More than 5% of the total Units in the Development with four or more bedrooms.

(H) Any Development that includes age restricted units that are not consistent with the Intergenerational Housing definition and policy or the definition of a Qualified Elderly Development; or

(I) Any Development that contains residential Units that violates the general public use requirement under Treasury Regulation §1.42-9.

(59) Intergenerational Housing--Housing that includes specific Units that are restricted to the age requirements of a Qualified Elderly Development and specific Units that are not age restricted in the same Development that:

(A) Have separate and specific buildings exclusively for the age restricted Units;

(B) Have specific leasing offices and leasing personnel for the age restricted Units;

(C) Have separate and specific entrances, and other appropriate security measures for the age restricted Units;

(D) Provide shared social service programs that encourage intergenerational activities but also provide separate amenities for each age group;

(E) Share the same Development Site;

(F) Are developed and financed under a common plan and owned by the same Person for federal tax purposes; and

(G) Meet the requirements of the federal Fair Housing Act.

(60) IRS--The Internal Revenue Service, or its successor.

(61) Land Use Restriction Agreement (LURA)--An agreement between the Department and the Development Owner which is binding upon the Development Owner's successors in interest, that encumbers the Development with respect to the requirements of this chapter, Chapter 2306, Texas Government Code, and the requirements of the Code, §42. (§2306.6702)

(62) Local Political Subdivision--A county or municipality (city or tribal reservation) in Texas. For purposes of §50.9(i)(5) of this chapter, a local political subdivision may act through a Government Instrumentality such as a housing authority, housing finance corporation, or municipal utility even if the Government Instrumentality's creating statute states that the entity is not itself a "political subdivision."

(63) Low-Income Unit--Sometimes referred to as a tax credit Unit, that is a Unit that is income and rent restricted at no greater than 60% of AMGI and is included in the Applicable Fraction for the Housing Tax Credit program.

(64) Managing General Partner--A general partner of a partnership that is vested with the authority to take actions that are binding on behalf of the partnership and the other partners.

(65) Material Deficiency--As referenced in §§50.5, 50.6, 50.8 and 50.9 of this chapter, is defined as any individual Administrative Deficiency or group of Administrative Deficiencies which, if addressed, would require, in the Department's reasonable judgment, a substantial reassessment or re-evaluation of the Application or which, are so numerous and pervasive that they indicate a failure by the Applicant to submit a substantively complete and accurate Application. (§2306.6708)

(66) Material Noncompliance--As defined in Chapter 60, Subchapter A of this title.

(67) Minority Owned Business--A business entity at least 51% of which is owned by members of a minority group or, in the case of a corporation, at least 51% of the shares of which are owned by members of a minority group, and that is managed and Controlled by members of a minority group in its daily operations. Minority group includes women, African Americans, American Indians, Asian Americans, and Mexican Americans and other Americans of Hispanic origin. (§2306.6734)

(68) Neighborhood Organization--An organization that is composed of persons living near one another within the organization's defined boundaries for the neighborhood and that has a primary purpose of working to maintain or improve the general welfare of the neighborhood. A neighborhood organization includes a homeowners' association or a property owners' association. (§2306.001(23-a))

(69) Net Rentable Area (NRA)--The unit space that is available exclusively to the tenant and is typically heated and cooled by a mechanical HVAC system. NRA is measured to the outside of the studs of a unit or to the middle of walls in common with other units. NRA does not include common hallways, stairwells, elevator shafts, janitor closets, electrical closets, balconies, porches, patios, or other areas not actually available to the tenants for their furnishings, nor does NRA include the enclosing walls of such areas.

(70) New Construction--Any construction of a Development or a portion of a Development that does not meet the definition of Rehabilitation (which includes Reconstruction).

(71) Person--Without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality or other organization or entity of any nature whatsoever and shall include any group of Persons acting in concert toward a common goal, including the individual members of the group.

(72) Persons with Disabilities--A person who:

(A) Has a physical, mental or emotional impairment that:

(i) Is expected to be of a long, continued and indefinite duration;

(ii) Substantially impedes his or her ability to live independently; and

(iii) Is of such a nature that the disability could be improved by more suitable housing conditions;

(B) Has a developmental disability, as defined in the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. §15002); or

(C) Has a disability, as defined in 24 CFR §5.403.

(73) Persons with Special Needs--Persons with alcohol and/or drug addictions, Colonia residents, Persons with Disabilities, victims of domestic violence, persons with HIV/AIDS, homeless populations and migrant farm workers.

(74) Pre-Application--A preliminary application, in a form prescribed by the Department, filed with the Department by an Applicant prior to submission of a Competitive Housing Tax Credit Application, for an allocation from the State Housing Credit Ceiling, including any required exhibits or other supporting material, as more fully described in this chapter. (§2306.6704)

(75) Pre-Application Acceptance Period--That period of time during which Competitive Housing Tax Credit Pre-Applications for a Housing Credit Allocation from the State Housing Credit Ceiling may be submitted to the Department.

(76) Principal--The term Principal is defined as Persons that will exercise Control over a partnership, corporation, limited liability company, trust, or any other private entity. In the case of:

(A) Partnerships, Principals include all General Partners, Special Limited Partners and Principals with ownership interest;

(B) Corporations, Principals include any officer authorized by the board of directors to act on behalf of the corporation, including the president, vice president, secretary, treasurer and all other executive officers, and each stock holder having a 10% or more interest in the corporation; and

(C) Limited liability companies, Principals include all managing members, members having a 10% or more interest in the limited liability company or any officer authorized to act on behalf of the limited liability company.

(77) Property--The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built thereon in connection with the Application.

(78) Qualified Allocation Plan (QAP)--This Plan as adopted.

(79) Qualified Basis--With respect to a building within a Development, the building's Eligible Basis multiplied by the Applicable Fraction, within the meaning of the Code, §42(c)(1).

(80) Qualified Census Tract--Any census tract which is so designated by the Secretary of HUD in accordance with the Code, §42(d)(5)(C)(ii).

(81) Qualified Elderly Development--A Development which meets the requirements of the federal Fair Housing Act and:

(A) Is intended for, and solely occupied by, individuals sixty-two (62) years of age or older; or

(B) Is intended and operated for occupancy by at least one individual fifty-five (55) years of age or older per Unit, where at least 80% of the total housing Units are occupied by at least one individual who is fifty-five (55) years of age or older; and where the Development Owner publishes and adheres to policies and procedures which demonstrate an intent by the owner and manager to provide housing for individuals fifty-five (55) years of age or older. (42 U.S.C. §3607(b))

(82) Qualified Market Analyst--A real estate appraiser certified or licensed by the Texas Appraiser Licensing and Certification Board, a real estate consultant, or other professional currently active in the subject property's market area who demonstrates competency, expertise, and the ability to render a high quality written report. The individual's performance, experience, and educational background will provide the general basis for determining competency as a Market Analyst. Competency will be determined by the Department, in its sole discretion. The Qualified Market Analyst must be a Third Party.

(83) Qualified Nonprofit Organization--An organization that is described in the Code, §501(c)(3) or (4), as these cited provisions may be amended from time to time, that is exempt from federal income taxation under the Code, §501(a), that is not affiliated with or Controlled by a for profit organization, and includes as one of its exempt purposes the fostering of low-income housing within the meaning of the Code, §42(h)(5)(C). A Qualified Nonprofit Organization may select to compete in one or more of the Set-Asides, including, but not limited to, the nonprofit Set-Aside, the At-Risk Development Set-Aside and the TRDO-USDA Allocation. (§2306.6729)

(84) Qualified Nonprofit Development--A Development in which a Qualified Nonprofit Organization (directly or through a partnership or wholly-owned subsidiary):

(A) Holds a controlling interest in the Development proposed to be financed from the nonprofit allocation pool (§2306.6729); and

(B) Owns an interest in the Development and materially participates (within the meaning of the Code, §469(h), as it may be amended from time to time) in its development and operation throughout the Compliance Period, and otherwise meets the requirements of the Code, §42(h)(5). (§2306.6729)

(85) Reference Manual--That certain manual, and any amendments thereto, produced by the Department which sets forth reference material pertaining to the Housing Tax Credit Program.

(86) Rehabilitation--The improvement or modification of an Existing Residential Development through alteration, incidental addition or enhancement. The term includes the demolition of an Existing Residential Development and the reconstruction of a Development on the Development Site, but does not include Adaptive Reuse. Rehabilitation includes repairs necessary to correct the results of deferred maintenance, the replacement of principal fixtures and components, improvements to increase the efficient use of energy, and installation of security devices. Reconstruction, for these purposes, includes the demolition of one or more residential buildings in an Existing Residential Development and the re-construction of the Units on the Development Site. Developments proposing Adaptive Reuse or proposing to increase the total number of Units in the Existing Residential Development are not considered Rehabilitation or reconstruction.

(87) Related Party--As defined, (§2306.6702)

(A) The following individuals or entities:

(i) The brothers, sisters, spouse, ancestors, and descendants of a person within the third degree of consanguinity, as determined by Chapter 573 of the Texas Government Code;

(ii) A person and a corporation, if the person owns more than 50% of the outstanding stock of the corporation;

(iii) Two or more corporations that are connected through stock ownership with a common parent possessing more than 50% of:

(I) The total combined voting power of all classes of stock of each of the corporations that can vote;

(II) The total value of shares of all classes of stock of each of the corporations; or

(III) The total value of shares of all classes of stock of at least one of the corporations, excluding, in computing that voting power or value, stock owned directly by the other corporation;

(iv) A grantor and fiduciary of any trust;

(v) A fiduciary of one trust and a fiduciary of another trust, if the same person is a grantor of both trusts;

(vi) A fiduciary of a trust and a beneficiary of the trust;

(vii) A fiduciary of a trust and a corporation if more than 50% of the outstanding stock of the corporation is owned by or for:

(I) The trust; or

(II) A person who is a grantor of the trust;

(viii) A person or organization and an organization that is tax-exempt under the Code, §501(a), and that is controlled by that person or the person's family members or by that organization;

(ix) A corporation and a partnership or joint venture if the same persons own more than:

(I) 50% of the outstanding stock of the corporation; and

(II) 50% of the capital interest or the profits' interest in the partnership or joint venture;

(x) An S corporation and another S corporation if the same persons own more than 50% of the outstanding stock of each corporation;

(xi) An S corporation and a C corporation if the same persons own more than 50% of the outstanding stock of each corporation;

(xii) A partnership and a person or organization owning more than 50% of the capital interest or the profits' interest in that partnership; or

(xiii) Two partnerships, if the same person or organization owns more than 50% of the capital interests or profits' interests.

(B) Nothing in this definition is intended to constitute the Department's determination as to what relationship might cause entities to be considered "related" for various purposes under the Code.

(88) Residential Rental Development--For purposes of this definition, Residential Rental Development does not include: hotels, motels dormitories, fraternity or sorority houses, rooming houses, hospitals, nursing homes, sanitariums, rest homes, trailer parks and courts for use on a transient basis. Residential Rental Development means:

(A) A property that meets specific requirements including occupancy of Low-Income Tenants during the affordability period when Units must be continually rented or available for rent;

(B) A building or structure, together with functionally related and subordinate facilities, containing one or more Units that are available to members of the general public; and

(C) A property that does not provide continual or frequent nursing, medical or psychiatric services.

(89) Rules--The Department's Housing Tax Credit Program Qualified Allocation Plan and Rules as presented in this chapter.

(90) Rural Area--An Area that is located (this definition is not the same as Rural Projects as defined in §520 of the Housing Act of 1949 for purposes of determining rural income as described in H.R 3221):

(A) Outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(B) Within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 25,000 or less and does not share a boundary with an Urban Area; or

(C) In an Area that is eligible for funding by Texas Rural Development Office or the United States Department of Agriculture (TRDO-USDA), other than an Area that is located in a municipality with a population of more than 50,000. (§2306.004)

(91) Rural Development--A Development or proposed Development that is located in a Rural Area, other than rural New Construction Developments with more than 80 Units.

(92) Selection Criteria--Criteria used to determine housing priorities of the State under the Housing Tax Credit Program as specifically defined in §50.9(i) of this chapter.

(93) Set-Aside--A reservation of a portion of the available Housing Tax Credits under the State Housing Credit Ceiling to provide financial support for specific types of housing or geographic locations or serve specific types of Applications or Applicants as permitted by the Qualified Allocation Plan on a priority basis. (§2306.6702)

(94) Single Room Occupancy (SRO)--A single efficiency unit that contains sanitary facilities but may or may not include food preparation facilities and is intended for occupancy by one person.

(95) Special Management Districts--Those districts named under Chapters 3801 to 3853, Texas Special District Local Laws Code, Subtitle C.

(96) State Housing Credit Ceiling--The limitation on the aggregate amount of Housing Credit Allocations that may be made by the Department during any calendar year, as determined from time to time by the Department in accordance with the Code, §42(h)(3)(C) and/or additional ceiling provided by The Housing and Economic Recovery Act of 2008, H.R 3221.

(97) Student Eligibility--Per the Code, §42(i)(3)(D), A Unit shall not fail to be treated as a low-income Unit merely because it is occupied:

(A) By an individual who is:

(i) A student and receiving assistance under Title IV of the Social Security Act (42 U.S.C. §§601 et seq.); or

(ii) Enrolled in a job training program receiving assistance under the Job Training Partnership Act (29 U.S.C.S. §§1501 et seq., generally; for full classification, consult U.S.C.S. Tables volumes) or under other similar federal, state, or local laws; or

(B) Entirely by full-time students if such students are:

(i) Single parents and their children and such parents and children are not dependents (as defined by the Code §152) of another individual; or

(ii) Married and file a joint return.

(98) Supportive Housing--Residential Rental Developments intended for occupancy by individuals or households transitioning from homelessness, at risk of homelessness, or in need of specialized and specific social services.

(99) Tax-Exempt Bond Development--A Development requesting or having been awarded Housing Tax Credits and which receives a portion of its financing from the proceeds of tax-exempt bonds which are subject to the state volume cap as described in the Code, §42(h)(4), such that the Development does not receive an allocation of tax credit authority from the State Housing Credit Ceiling.

(100) Texas Department of Rural Affairs (TDRA)--as established by Chapter 487 of the Texas Government Code.

(101) Third Party--A Third Party is a Person who is not:

(A) An Applicant, General Partner, Developer, or General Contractor; or

(B) An Affiliate or a Related Party to the Applicant, General Partner, Developer or General Contractor; or

(C) Receiving any portion of the fees from the Development.

(102) Threshold Criteria--Criteria used to determine whether the Development satisfies the minimum level of acceptability for consideration as specifically defined in §50.9(h) of this chapter. (§2306.6702)

(103) Total Housing Development Cost--The total of all costs incurred or to be incurred by the Development Owner in acquiring, constructing, rehabilitating and financing a Development, as determined by the Department based on the information contained in the Application. Such costs include reserves and any expenses attributable

to commercial areas. Costs associated with the sale or use of Housing Tax Credits to raise equity capital shall also be included in the Total Housing Development Cost. Such costs include but are not limited to syndication and partnership organization costs and fees, filing fees, broker commissions, related attorney and accounting fees, appraisal, engineering, and the environmental site assessment.

(104) TRDO-USDA--Texas Rural Development Office (TRDO) of the United States Department of Agriculture (USDA) serving the State of Texas (also known as USDA Rural Development and formerly known as TxFmHA) or its successor.

(105) Unit--Any residential rental unit consisting of an accommodation including a single room used as an accommodation on a non-transient basis, that contains complete physical facilities and fixtures for living, sleeping, eating, cooking (such as a microwave), and sanitation. (§2306.6702)

(106) Urban Area--The Area that is located within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area other than an Area described in paragraph (90)(B) of this section or eligible for funding as described in paragraph (90)(C) of this section.

(107) Urban Core--A compact and contiguous geographical area that is located in a Metropolitan Statistical Area within the city limits of a city with a population of no less than 250,000 composed of adjacent block groups in which at least 90% of the land not in public ownership is zoned to accommodate a mix of medium or high density residential and commercial uses and at least 50% of such land is actually being used for such purposes based on high density residential structures and/or commercial structures already constructed.

§50.4. State Housing Credit Ceiling.

The Department shall determine the State Housing Credit Ceiling for each calendar year as provided in the Code, §42(h)(3)(C), using such information and guidance as may be made available by the Internal Revenue Service and/or The Housing and Economic Recovery Act of 2008, H.R. 3221 and H.R. 1424. The Department shall publish each such determination in the *Texas Register* within thirty (30) days after the receipt of such information as is required for that purpose by the Internal Revenue Service. The aggregate amount of commitments of Housing Credit Allocations made by the Department during any calendar year shall not exceed the State Housing Credit Ceiling for such year as provided in the Code, §42. As permitted by the Code, §42(h)(4), Housing Credit Allocations made to Tax-Exempt Bond Developments are not included in the State Housing Credit Ceiling.

§50.5. Ineligibility; Disqualification and Debarment; Certain Applicant and Development Standards; Representation by Former Board Member or Other Person; Due Diligence, Sworn Affidavit; Appeals and Administrative Deficiencies for Ineligibility, Disqualification and Debarment.

(a) Ineligibility. An Application is ineligible if:

(1) The Applicant, Development Owner, Developer or Guarantor has been or is barred, suspended, or terminated from procurement in a state or federal program or listed in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs; or (§2306.6721(c)(2))

(2) The Applicant, Development Owner, Developer or Guarantor has been convicted of a state or federal felony crime involving fraud, bribery, theft, misrepresentation of material fact, misappropriation of funds, or other similar criminal offenses within fifteen (15) years preceding the Application deadline; or

(3) The Applicant, Development Owner, Developer or Guarantor at the time of Application is: subject to an enforcement or disciplinary action under state or federal securities law or by the NASD; is subject to a federal tax lien; or is the subject of an enforcement proceeding with any Governmental Entity; or

(4) The Applicant, Development Owner, Developer or Guarantor with any past due audits has not submitted those past due audits to the Department in a satisfactory format. A Person is not eligible to receive a commitment of Housing Tax Credits from the Department if any audit finding or questioned or disallowed cost is unresolved as of June 1 of each year, or for Tax-Exempt Bond Developments or other Applications not applying for Housing Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.) no later than thirty (30) days after Volume III of the Application is submitted; or (§2306.6703(a)(1))

(5) At the time of Application or at any time during the two-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments any time during the two-year period preceding the date the Application is submitted to the Department), the Applicant or a Related Party is or has been:

(A) A member of the Board; or

(B) The Executive Director, a Deputy Executive Director, the Director of Multifamily Finance Production, the Director of Portfolio Management and Compliance, the Director of Real Estate Analysis, or a manager over Housing Tax Credits employed by the Department; or (§2306.6703(a)(2))

(6) The Applicant proposes to replace in less than fifteen (15) years any private activity bond financing of the Development described by the Application, unless:

(A) The Applicant proposes to maintain for a period of thirty (30) years or more 100% of the Development Units supported by Housing Tax Credits as rent-restricted and exclusively for occupancy by individuals and families earning not more than 50% of the Area Median Gross Income, adjusted for family size; and

(B) At least one-third of all the units in the Development are public housing units or Section 8 Development-based units; or

(C) The applicable private activity bonds will be redeemed only in an amount consistent with their proportionate amortization; or

(D) If the redemption of the applicable private activity bonds will occur in the first five years of the operation of the development and complies with §429(h)(4), Internal Revenue Code of 1986:

(i) on the date the certificate of reservation is issued, the Texas Bond Review Board determines that there is not a waiting list for private activity bonds in the same priority level established under §1372.0321, Texas Government Code or, if applicable, in the same uniform state service region, as referenced in §1372.0231, Texas Government Code, that is served by the proposed development; and

(ii) the applicable private activity bonds will be redeemed according to underwriting, if any, established by the Department. (§2306.6703)

(7) The Development is located in a municipality or in a valid Extra Territorial Jurisdiction (ETJ) of a municipality, or if located completely outside a municipality, a county, that has more than twice the state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Round begins (or for Tax-Exempt Bond Developments at the time the reservation is made by the Texas Bond Review Board) unless the Applicant: (§2306.6703(a)(4))

(A) Has obtained prior approval of the Development from the Governing Body of the appropriate municipality or county containing the Development; and

(B) Has included in the Application a written statement of support from that Governing Body. This statement must reference this rule and authorize an allocation of Housing Tax Credits for the Development;

(C) For purposes of this paragraph, evidence under subparagraphs (A) and (B) of this paragraph must be received by the Department no later than April 1, 2010 (or for Tax-Exempt Bond Developments no later than fourteen (14) days before the Board meeting where the credits will be considered) and may not be more than one year old from the date the Volume 1 is submitted to the Department; or

(8) The Applicant proposes to construct a new Development proposing New Construction or Adaptive Reuse (excluding New Construction of non-residential buildings) that is located one linear mile (measured by a straight line on a map) or less from a Development that: (§2306.6703(a)(3))

(A) Serves the same type of household as the new Development, regardless of whether the Development serves families, elderly individuals, or another type of household (Intergenerational Housing is not a type of household as it relates to this restriction); and

(B) Has received an allocation of Housing Tax Credits (including Tax-Exempt Bond Developments) for any New Construction at any time during the three-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments the three-year period preceding the date the Volume I is submitted); and

(C) Has not been withdrawn or terminated from the Housing Tax Credit Program;

(D) An Application is not ineligible under this paragraph if:

(i) The Development is using federal HOPE VI funds received through the United States Department of Housing and Urban Development; locally approved funds received from a public improvement district or a tax increment financing district; funds provided to the state under the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. §§12701 et seq.); or funds provided to the state and participating jurisdictions under the Housing and Community Development Act of 1974 (42 U.S.C. §§5301 et seq.); or

(ii) The Development is located in a county with a population of less than one million; or

(iii) The Development is located outside of a metropolitan statistical area; or

(iv) The Governing Body, of the Local Political Subdivision where the Development is to be located has by vote specifically allowed the construction of a new Development located within one linear mile or less from a Development described under subparagraphs (A) - (C) of this paragraph. For purposes of this clause, evidence of the Governing Body vote or evidence required by this subparagraph must be received by the Department no later than April 1, 2010 (or for Tax-Exempt Bond Developments no later than fourteen (14) days before the Board meeting where the credits will be committed) and may not be more than one year old.

(E) In determining when an existing Development received an allocation as it relates to the application of the three-year period, the Development will be considered from the date the Board took action on approving the allocation of tax credits. In dealing with ties between two or more Developments as it relates to this rule, refer to §50.9(j) of this chapter.

(9) A Development is proposed to be located adjacent to or within 300 feet of a sexually-oriented business. For purposes of this paragraph, a sexually-oriented business shall be defined as stated in §243.002 of the Texas Government Code.

(10) The Application is submitted after the Application submission deadline (time or date); includes an electronic submission that is unreadable by the Department's computer system; has an entire Volume of the Application missing; or has a Material Deficiency as defined under §50.3(65) of this chapter. If an Application is determined ineligible pursuant to this subsection, the Application will be terminated without further consideration and the Applicant will be notified of such termination. To the extent that a review was able to be performed, specific reasons for the Department's determination of ineligibility will be included in the termination letter to the Applicant.

(11) An Applicant has requested more than $2 million in annual competitive housing tax credits.

(b) Disqualification and Debarment. The Department will disqualify an Application, and/or debar a Person, if it is determined by the Department that any issues identified in the paragraphs of this subsection exist. The Department may debar a Person for one year from the date of debarment, or until the violation causing the debarment has been remedied, whichever term is longer, if the Department determines the facts warrant it. Causes for disqualification and debarment include: (§2306.6721)

(1) The provision of fraudulent information, knowingly falsified documentation, or other intentional or negligent material misrepresentation in the Application or other information submitted to the Department at any stage of the evaluation or approval process; or

(2) The Applicant, Development Owner, Developer or Guarantor or anyone that has Controlling ownership interest in the Development Owner, Developer or Guarantor, or any Affiliate of such entities that is active in the ownership or Control of one or more other rent restricted rental housing properties in the state of Texas administered by the Department is in Material Noncompliance with the LURA (or any other document containing an Extended Housing Commitment) or the program rules in effect for such property as further described in Chapter 60 of this title (§2306.6721(c)(3)); or

(3) The Applicant, Development Owner, Developer, or any Guarantor, anyone that has Controlling ownership interest in the Development Owner, Developer or Guarantor, or any Affiliate of such entity that is active in the ownership or Control has been a Principal of any entity that failed to make all loan payments to the Department in accordance with the terms of the loan, as amended, or was otherwise in default with any provisions of any loans from the Department; or

(4) The Applicant or the Development Owner that is active in the ownership or Control of one or more tax credit properties in the state of Texas has failed to pay in full any fees or penalties within thirty (30) days of when they were billed by the Department, as further described in §50.20 of this chapter; or

(5) An Applicant or a Related Party and any Person who is active in the construction, Rehabilitation, ownership, or Control of the proposed Development, including a General Partner or contractor, and a Principal or Affiliate of a General Partner or contractor, or an individual employed as a consultant, lobbyist or attorney by an Applicant or a Related Party, communicates with any Board member during the period of time beginning on the date Applications are filed in an Application Round and ending on the date the Board makes a final decision with respect to the approval of any Application in that Application

Round, unless the communication takes place at any board meeting or public hearing held with respect to that Application but not during a recess or other non-record portion of the meeting or hearing. Communication with Department staff must be in accordance with §50.9(b) of this chapter; violation of the communication restrictions of §50.9(b) of this chapter is also a basis for disqualification and/or debarment; (§2306.1113)

(6) It is determined by the Department's General Counsel that there is evidence that establishes probable cause to believe that an Applicant, Development Owner, Developer, or any of their employees or agents has violated a state revolving door or other standard of conduct or conflict of interest statute, including §2306.6733, Texas Government Code, or a section of Chapter 572, Texas Government Code, in making, advancing, or supporting the Application;

(7) Applicants may be ineligible as further described in this section;

(8) The Applicant, Development Owner, Developer, Guarantor, or any Affiliate of such entity whose previous funding contracts or commitments have been partially or fully deobligated during the twelve (12) months prior to the submission of the Application and through the date of final allocation due to a failure to meet contractual obligations;

(9) The Applicant, Development Owner, Developer, Guarantor, or any Affiliate of such entity whose pre-development award of non-tax credit funds from the Department has not been repaid for the Development at the time of Carryover Allocation or Bond closing.

(c) Certain Applicant and Development Standards. Notwithstanding any other provision of this chapter, the Department may not allocate tax credits to a Development proposed by an Applicant if the Department determines that: (§2306.223)

(1) The Development is not necessary to provide needed decent, safe, and sanitary housing at rental prices that individuals or families of low and very low-income or families of moderate income can afford;

(2) The Development Owner undertaking the proposed Development will not supply well-planned and well-designed housing for individuals or families of low and very low-income or families of moderate income;

(3) The Development Owner is not financially responsible;

(4) The Development Owner has contracted, or will contract for the proposed Development with, a Developer that:

(A) Is on the Department's debarred list, including any parts of that list that are derived from the debarred list of the United States Department of Housing and Urban Development;

(B) Has breached a contract with a public agency and failed to cure that breach; or

(C) Misrepresented to a subcontractor the extent to which the Developer has benefited from contracts or financial assistance that has been awarded by a public agency, including the scope of the Developer's participation in contracts with the agency and the amount of financial assistance awarded to the Developer by the agency;

(5) The financing of the housing Development is not a public purpose and will not provide a public benefit; and/or

(6) The Development will be undertaken outside the authority granted by this chapter to the Department and the Development Owner.

(d) Representation by Former Board Member or Other Person. (§2306.6733)

(1) A former Board member or a former executive director, deputy executive director, director of multifamily finance production, director of portfolio management and compliance, director of real estate analysis or manager over Housing Tax Credits previously employed by the Department may not:

(A) For compensation, represent an Applicant or one of its Related Parties for an allocation of tax credits before the second anniversary of the date that the Board member's, director's, or manager's service in office or employment with the Department ceased; or

(B) Represent any Applicant or a Related Party of an Applicant or receive compensation for services rendered on behalf of any Applicant or Related Party regarding the consideration of an Application in which the former board member, director, or manager participated during the period of service in office or employment with the Department, either through personal involvement or because the matter was within the scope of the board member's, director's, or manager's official responsibility; or for compensation, communicate directly with a member of the legislative branch to influence legislation on behalf of an Applicant or Related Party before the second anniversary of the date that the board member's, director's, or manager's service in office or employment with the Department ceased.

(2) A Person commits a criminal offense if the Person violates §2306.6733, Texas Government Code. An offense under this section is a Class A misdemeanor.

(e) Due Diligence, Sworn Affidavit. In exercising due diligence in considering information of possible ineligibility, possible grounds for disqualification and debarment, Applicant and Development standards, possible improper representation or compensation, or similar matters, the Department may request a sworn affidavit or affidavits from the Applicant, Development Owner, Developer, Guarantor, or other Persons addressing the matter. If an affidavit determined to be sufficient by the Department is not received by the Department within seven (7) business days of the date of the request by the Department, the Department may terminate the Application.

(f) Appeals and Administrative Deficiencies for Ineligibility, Disqualification and Debarment. An Applicant or Person found ineligible, disqualified, debarred or otherwise terminated under subsections (a) - (e) of this section will be notified in accordance with the Administrative Deficiency process described in §50.9(d)(4) of this chapter. They may also utilize the appeals process described in §50.17(b) of this chapter. (§2306.6721(d))

§50.6. Site and Development Restrictions: Floodplain; Ineligible Building Types; Scattered Site Limitations; Credit Amount; Limitations on the Size of Developments; Limitations on Rehabilitation Costs; Unacceptable Sites; Appeals and Administrative Deficiencies for Site and Development Restrictions.

(a) Floodplain. Any Development proposing New Construction or Reconstruction and located within the one-hundred (100) year floodplain as identified by the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps must develop the site so that all finished ground floor elevations are at least one foot above the flood plain and parking and drive areas are no lower than six inches below the floodplain, subject to more stringent local requirements. If no FEMA Flood Insurance Rate Maps are available for the proposed Development, flood zone documentation must be provided from the local government with jurisdiction identifying the one-hundred (100) year floodplain. No buildings or roads that are part of a Development proposing Rehabilitation or Adaptive Reuse, with the exception of Developments with federal funding assistance from HUD or TX

USDA-RHS, will be permitted in the one-hundred (100) year floodplain unless they already meet the requirements established in this subsection for New Construction.

(b) Ineligible Building Types. Applications involving Ineligible Building Types as defined in §50.3(58) of this chapter will not be considered for allocation of tax credits.

(c) Scattered Site Limitations. Consistent with §50.3(32) of this chapter, a Development must be financed under a common plan, be owned by the same Person for federal tax purposes, and the buildings may be either located on a single site or contiguous site, or be located on scattered sites and contain only rent-restricted units. Tax-Exempt Bond Developments are permitted to be located on multiple sites consistent with Chapter 1372 of the Texas Government Code and as further clarified by the Texas Bond Review Board.

(d) Credit Amount. The Department shall issue tax credits only in the amount needed for the financial feasibility and viability of a Development throughout the affordability period. The issuance of tax credits or the determination of any allocation amount in no way represents or purports to warrant the feasibility or viability of the Development by the Department, or that the Development will qualify for and be able to claim Housing Tax Credits. An Applicant may not request more than $2 million in annual tax credits for any given Application. The Department shall not allocate more than $2 million of tax credits in any given Application Round to any Applicant, Developer, Related Party or Guarantor; Competitive Housing Tax Credits approved by the Board during the 2010 calendar year, including commitments from the 2010 Credit Ceiling and forward commitments from the 2010 Credit Ceiling, are applied to the credit cap limitation for the 2010 Application Round. In order to evaluate this $2 million limitation, Nonprofit entities, public housing authorities, publicly traded corporations, individual board members, and executive directors must provide the documentation required in the Application with regard to this requirement. In order to encourage the capacity enhancement of Developers with less capacity the Department will prorate the credit amount allocated in situations where a Developer partners with another Developer. The Department will prorate the credits ascribed to each developer based on the higher of: the percentage ownership of the General Partner, if there is an ownership interest by the experienced Developer, or the proportional percentage of the Developer fee received, if this applies to a Developer without an ownership interest. To be considered for this provision, a copy of a Joint Venture Agreement or similar document between the Developers must be provided and a completed credit limit form describing the structural decision making process for the Development. Tax-Exempt Bond Development Applications are not subject to these Housing Tax Credit limitations, and Tax-Exempt Bond Development Applications will not count towards the total limit on tax credits per Applicant. The limitation does not apply (§2306.6711(b)):

(1) To an entity which raises or provides equity for one or more Developments, solely with respect to its actions in raising or providing equity for such Developments (including syndication related activities as agent on behalf of investors);

(2) To the provision by an entity of "qualified commercial financing" within the meaning of the Code (without regard to the 80% limitation thereof);

(3) To a Qualified Nonprofit Organization or other not-for-profit entity, to the extent that the participation in a Development by such organization consists only of the provision of loan funds, grants or social services; and

(4) To a Development Consultant with respect to the provision of consulting services, provided the Development Consultant fee received for such services does not exceed 10% of the fee to be paid to the Developer (or 20% for Qualified Nonprofit Developments), or $150,000, whichever is greater.

(e) Limitations on the Size of Developments.

(1) The minimum Development size will be 16 Units if the Development involves Housing Tax Credits. The minimum Development size will be 4 Units if the funding source only involves the Housing Trust Fund or HOME Program.

(2) Rural Developments involving any New Construction or Adaptive Reuse (excluding New Construction of non-residential buildings) will be limited to 80 Units (this includes individual Tax-Exempt Bond Developments). Rural Developments involving only Rehabilitation (excluding reconstruction) do not have a limitation as to the number of Units.

(3) Urban Developments involving any New Construction or Adaptive Reuse (excluding New Construction of non-residential buildings), in the Competitive Housing Tax Credit Application Round will be limited to 252 total Units, wherein the maximum Department administered Units will be limited to 200 Units. Tax-Exempt Bond Developments will be limited to 252 restricted and total Units. These maximum Unit limitations also apply to those Developments which involve a combination of Rehabilitation, Reconstruction, and New Construction. Only Developments that consist solely of acquisition/Rehabilitation or Rehabilitation may exceed the maximum Unit restrictions.

(4) For Applications that are proposing an additional phase to an existing tax credit Development; that are otherwise adjacent to an existing tax credit Development; or that are proposing a Development on a contiguous site to another Application awarded in the same program year, the combined Unit total for the existing and proposed Developments may not exceed the maximum allowable Development size set forth in this subsection unless:

(A) The first phase of the Development has been completed and has attained Sustaining Occupancy (as defined in §1.31 of this title) for at least six (6) months; or

(B) A resolution from the Governing Body of the city or county, in which the proposed Development is located, dated on or before the date the Application is submitted, is submitted with the Application. Such resolution must state that there is a need for additional Units and that the Governing Body has reviewed a market study, the conclusion of which supports the need for additional Units; or

(C) The proposed Development is intended to provide replacement of previously existing affordable Units on the Development Site or that were originally located within a one mile radius from the Development Site; provided, however, the combined number of Units in the proposed Development may not exceed the number of Units being replaced. Documentation of such replacement units must be provided.

(f) Limitations on the Location of Developments. Staff will only recommend, and the Board may only allocate, Housing Tax Credits from the State Housing Credit Ceiling to more than one Development from the State Housing Credit Ceiling in the same calendar year if the Developments are, or will be, located more than one linear mile apart as determined by the Department. If the Board forward commits credits from the following year's State Housing Credit Ceiling, the Development is considered to be in the calendar year in which the Board votes, not in the year of the State Housing Credit Ceiling. This limitation applies only to communities contained within counties with populations exceeding one million (which for calendar year 2010 are Harris, Dallas, Tarrant and Bexar Counties). For purposes of this chapter, any two sites not more than one linear mile apart are deemed to be "in a single community." (§2306.6711(f)) This restriction does not apply to the

allocation of Housing Tax Credits to Developments financed through the Tax-Exempt Bond program, including the Tax-Exempt Bond Development Applications under review and existing Tax-Exempt Bond Developments in the Department's portfolio. (§2306.67021)

(g) Limitations of Development in Certain Census Tracts. Staff will not recommend and the Board will not allocate Housing Tax Credits for a Competitive Housing Tax Credit or Tax-Exempt Bond Development located in a census tract that has more than 30% Housing Tax Credit Units per total households in the census tract as established by the U.S. Census Bureau for the most recent Decennial Census unless the Applicant:

(1) In an Area whose population is less than 100,000;

(2) Proposes only reconstruction or Rehabilitation (excluding New Construction of non-residential buildings); or

(3) Submits to the Department an approval of the Development referencing this rule in the form of a resolution from the Governing Body of the appropriate municipality or county containing the Development. For purposes of this paragraph, evidence of the local government approval must be received by the Department no later than April 3, 2010 for Competitive Housing Tax Credit Applications (or for Tax-Exempt Bond Development Applications no later than fourteen (14) days before the Board meeting where the credits will be committed). These ineligible census tracts are outlined in the 2010 Housing Tax Credit Site Demographic Characteristics Report.

(h) Developments Proposing to Qualify for a 30% increase in Eligible Basis. Staff will only recommend a 30% increase in Eligible Basis (paragraphs (3) and (4) of this subsection only apply to Competitive Housing Tax Credits allocated from the State Credit Ceiling) if:

(1) The Development proposing to build in a Hurricane Rita Gulf Opportunity Zone (Rita GO Zone), which was designated as a Difficult to Develop Area as determined by H.B. 4440, is able to be placed in service by December 31, 2010 (or date as revised by the Internal Revenue Service) as certified in the Application;

(2) The Development is located in a Qualified Census Tract that has less than 40% Housing Tax Credit Units per households in the tract as established by the U.S. Census Bureau for the most recent Decennial Census. Developments located in a Qualified Census Tract that has in excess of 40% Housing Tax Credit Units per households in the tract are not eligible to qualify for a 30% increase in Eligible Basis, which would otherwise be available for the Development Site pursuant to the Code, §42(d)(5)(C), unless the Development is proposing only Reconstruction or Rehabilitation (excluding New Construction of non-residential buildings). These ineligible Qualified Census Tracts are outlined in the 2010 Housing Tax Credit Site Demographic Characteristics Report;

(3) The Development qualifies for and receives Renewable Energy Tax Credits. For purposes of this paragraph, the Application will be required to include an architect's letter or contractor bid as evidence that the Applicant will be eligible to request Renewable Energy Tax Credits in its income tax filings. Applicant will be required to show proof of receipt of the Renewable Energy Tax Credits at the time of Cost Certification; or

(4) Pursuant to the authority granted by H.R. 3221, the Development meets one of the criteria described in subparagraphs (A) - (D) of this paragraph:

(A) Any Rural Development;

(B) Developments proposing at least 50% of the total number of Units for Supportive Housing;

(C) Developments proposing to provide 10% of the Low-Income Units, that will serve individuals and families at or below 30% of AMGI, in excess of those that are proposed in §50.9(i)(3) of this chapter; or

(D) Developments proposed in High Opportunity Areas as provided in clauses (i) - (iv) of this subparagraph:

(i) A Development that is proposed to be located within one-quarter mile of existing major bus transfer centers and/or regional or local commuter rail transportation stations that are accessible to all residents including Persons with Disabilities;

(ii) A Development that is proposed to be located in a census tract which has an AMGI that is higher than the AMGI of the county or place in which the census tract is located as of the first day of the Application Acceptance Period;

(iii) A Development (serving families with children) that is proposed to be located in a school attendance zone that has an academic rating of "Exemplary" or "Recognized" rating (as determined by the Texas Education Agency) as of the first day of the Application Submission Acceptance Period; or

(iv) A Development that is proposed in a census tract that has no greater than 10% poverty population according to the most recent census data (these census tracts are designated in the 2010 Housing Tax Credit Site Demographic Characteristics Report).

(5) The Development proposing to build in a Hurricane Ike eligible county as designated by the Emergency Economic Stabilization Act of 2008, H.R. 1424 and Presidential Declaration FEMA-1791-DR and is able to place in service by December 31, 2012 (or the date as revised by the Internal Revenue Service) as certified in the Application.

(i) Rehabilitation Costs. Developments involving Rehabilitation must establish that the Rehabilitation will substantially improve the condition of the housing and will involve at least $15,000 per Unit in direct hard costs (including site work, contingency, contractor profit, overhead and general requirements) unless financed with TRDO-USDA in which case the minimum is $9,000.

(j) Unacceptable Sites. Developments will be ineligible if the Development is located on a site that is determined to be unacceptable by the Department. This determination will be made at the sole discretion of the Department, but only after discussion with the Application regarding the features of the site considered to be unacceptable.

(k) Appeals and Administrative Deficiencies for Site and Development Restrictions. An Application or Development found to be in violation under subsections (a) - (j) of this section will be notified in accordance with the Administrative Deficiency process described in §50.9(d)(4) of this chapter. They may also utilize the appeals process described in §50.17(b) of this chapter.

§50.7. Regional Allocation Formula; Set-Asides; Redistribution of Credits.

(a) Regional Allocation Formula. (§2306.1115 as required by §2306.111(d) of the Texas Government Code) The Department uses a regional distribution formula developed by the Department and commented on by the public to distribute credits from the State Housing Credit Ceiling to all Urban Areas and Rural Areas. This formula establishes separate targeted tax credit amounts for Rural Areas and Urban Areas within each of the Uniform State Service Regions. Each Uniform State Service Region's targeted tax credit amount will be published on the Department's website. The regional allocation for Rural Areas is referred to as the Rural Regional Allocation and the regional allocation for Urban Areas is referred to as the Urban Regional Allocation. Developments qualifying for the Rural Regional Allocation must

meet the Rural Development definition. The Regional Allocation target will reflect that at least 20% of the State Housing Credit Ceiling for each calendar year shall be allocated to Developments in Rural Areas with a minimum of $500,000 for each Uniform State Service Region. (§2306.111(d)(3))

(b) Set-Asides. An Applicant may elect to compete in as many of the following Set-Asides for which the proposed Development qualifies (§2306.111(d)):

(1) At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Developments which meet the requirements of the Code, §42(h)(5). Qualified Nonprofit Organizations must have the Controlling interest in the Development Owner applying for this Set-Aside. If the Application is filed on behalf of a limited partnership, the Qualified Nonprofit Organization must be the Managing General Partner. If the Application is filed on behalf of a limited liability company, the Qualified Nonprofit Organization must be the controlling Managing Member. Additionally, a Qualified Nonprofit Development submitting an Application in the nonprofit Set-Aside must have the nonprofit entity or its nonprofit Affiliate or subsidiary be the Developer or a co-Developer as evidenced in the development agreement; (§2306.6729 and §2306.6706(b))

(2) At least 5% of the State Housing Credit Ceiling for each calendar year shall be allocated to Developments which are financed through TRDO-USDA, that meet the definition of a Rural Development, do not exceed 80 Units if proposing any New Construction (excluding New Construction of non-residential buildings), and have filed an "Intent to Request 2010 Housing Tax Credits" form by the Pre-Application submission deadline. (§2306.111(d)(2)) If an Application in this Set-Aside involves Rehabilitation it will be attributed to, and come from the, At-Risk Development Set-Aside; if an Application in this Set-Aside involves New Construction it will be attributed to and come from the applicable Uniform State Service Region. Developments financed through TRDO-USDA's §538 Guaranteed Rural Rental Housing Program, in whole or in part, will not be considered under this Set-Aside. Any Rehabilitation or Reconstruction of an existing §515 Development that retains the §515 loan and restrictions will be considered under the At-Risk Development and TRDO-USDA Set-Asides, unless such Development is also financed through TRDO-USDA's §538 Guaranteed Rural Rental Housing Program. Commitments of 2010 Competitive Housing Tax Credits issued by the Board in 2010 will be applied to each Set-Aside, Rural Regional Allocation, Urban Regional Allocation and/or TRDO-USDA Set-Aside for the 2010 Application Round as appropriate;

(3) At least 15% of the State Housing Credit Ceiling for each calendar year will be allocated under the At-Risk Development Set-Aside and will be deducted from the State Housing Credit Ceiling prior to the application of the regional formula required under subsection (a) of this section. Through this Set-Aside, the Department, to the extent possible, shall allocate credits to Applications involving the preservation of Developments designated as At-Risk Developments as defined in §50.3(14) of this chapter. (§2306.6714) To qualify as an At-Risk Development, the Applicant must provide evidence that it either is not eligible to renew, retain or preserve any portion of the financial benefit described in §50.3(14)(A) of this chapter, or provide evidence that it will renew, retain or preserve the financial benefit described in §50.3(14)(A) of this chapter; and must have filed an "Intent to Request 2010 Housing Tax Credits" form by the Pre-Application submission deadline. Up to 5% of the State Credit Ceiling associated with this Set-Aside may be given priority to Rehabilitation Developments funded with TRDO.

(c) Redistribution of Credits. (§2306.111(d)) If any amount of Housing Tax Credits remain after the initial commitment of Housing Tax Credits among the Set-Asides, Rural Regional Allocation and Urban Regional Allocation, the Department may redistribute the credits amongst the different regions and Set-Asides depending on the quality of Applications submitted as evaluated under the factors described in §50.9(d) of this chapter, the need to most closely achieve regional allocation goals and then the level of demand exhibited in the Uniform State Service Regions during the Application Round, except that, if there are any tax credits set aside for Developments in a Rural Area in a specific Uniform State Service Region that remain after the allocation under §50.9(d)(5)(C) of this chapter, those tax credits shall be made available in any other Rural Area in the state, first, and then to Developments in Urban areas of any uniform state service region. (§2306.111(d)(3)) As described in subsection (b)(1) and (2) of this section, no more than 90% of the State's Housing Credit Ceiling for the calendar year may go to Developments which are not Qualified Nonprofit Developments. If credits will be transferred from a Uniform State Service Region which does not have enough qualified Applications to meet its regional credit distribution amount, then those credits will be apportioned to the other Uniform State Service Regions.

§50.8. Pre-Applications for Competitive Housing Tax Credits: Submission; Communication with Departments Staff; Evaluation Process; Threshold Criteria and Review; Results (§2306.6704).

(a) Pre-Application Submission. Any Applicant requesting a Housing Credit Allocation may submit a Pre-Application to the Department during the Pre-Application Acceptance Period along with the required Pre-Application Fee as described in §50.20 of this chapter. Only one Pre-Application may be submitted by an Applicant for each site under the State Housing Credit Ceiling. The Pre-Application submission is a voluntary process. While the Pre-Application Acceptance Period is open, Applicants may withdraw their Pre-Application and subsequently file a new Pre-Application utilizing the original Pre-Application Fee that was paid as long as no evaluation was performed by the Department. The Department is authorized though not required to request the Applicant to provide additional information it deems relevant to clarify information contained in the Pre-Application or to submit documentation for items it considers to be Administrative Deficiencies. The rejection of a Pre-Application shall not preclude an Applicant from submitting an Application with respect to a particular Development or site at the appropriate time.

(b) Communication with the Department. Applicants that submit a Pre-Application are restricted from communication with Department staff as provided in §50.9(b) of this chapter. (§2306.1113)

(c) Pre-Application Evaluation Process. Eligible Pre-Applications will be evaluated for Pre-Application Threshold Criteria. Applications that are associated with a TRDO-USDA Development are not exempt from Pre-Application and are eligible to compete for the Pre-Application points further outlined in §50.9(i)(14) of this chapter. Pre-Applications that are found to have Administrative Deficiencies will be handled in accordance with §50.9(d)(4) of this chapter. Department review at this stage is limited and not all issues of eligibility and threshold are reviewed at Pre-Application. Acceptance by staff of a Pre-Application does not ensure that an Applicant satisfies all Application eligibility, Threshold or documentation requirements. The Department is not responsible for notifying an Applicant of potential areas of ineligibility or threshold deficiencies at the time of Pre-Application.

(d) Pre-Application Threshold Criteria and Review. Applicants submitting a Pre-Application will be required to submit information demonstrating their satisfaction of the Pre-Application Threshold Criteria. The Pre-Applications not meeting the Pre-Application Threshold Criteria will be terminated and the Applicant will receive a written notice to the effect that the Pre-Application Threshold Criteria have not been met. The Department shall not be responsible for the

Applicant's failure to meet the Pre-Application Threshold Criteria and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Pre-Application Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled. The Pre-Application Threshold Criteria include:

(1) Submission of a "Pre-Application Submission Form" and "Certification of Pre-Application Itemized Self-Score." The Applicant may not change the Self-Score unless requested by the Department in a Deficiency Notice;

(2) Evidence of property control through March 1, 2010 as evidenced by the documentation required under §50.9(h)(7)(A) of this chapter; and

(3) Evidence in the form of a certification that all of the notifications required under this paragraph have been made. Requests for Neighborhood Organizations under subparagraph (A) of this paragraph must be made by the deadlines described in subparagraph (A)(i) of this paragraph; notifications under subparagraph (C) of this paragraph must be made prior to the close of the Pre-Application Acceptance Period. (§2306.6704) Evidence of notification must meet the requirements identified in subparagraph (B) of this paragraph to all of the individuals and entities identified in subparagraph (B) of this paragraph. (§2306.6704)

(A) The Applicant must request a list of Neighborhood Organizations on record with the county and state whose boundaries include the proposed Development Site as follows:

(i) No later than December 7, 2009, the Applicant must e-mail, fax or mail with registered receipt, email or fax to be "receipt confirmed," a completed "Neighborhood Organization Request" letter as provided in the Pre-Application to the local elected official for the city and county where the Development is proposed to be located. If the Development is located in an Area that has district based local elected officials, or both at-large and district based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located an Area that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. If the Development is not located within a city or is located in the Extra Territorial Jurisdiction (ETJ) of a city, the county local elected official must be contacted. In the event that local elected officials refer the Applicant to another source, the Applicant must request Neighborhood Organizations from that source in the same format;

(ii) If no reply letter is received from the local elected officials by January 1, 2010, then the Applicant must certify to that fact in the "Pre-Application Notification Certification Form" provided in the Pre-Application;

(iii) The Applicant must list all Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as provided by the local elected officials, or that the Applicant has knowledge of (irrespective of whether the organization is on record with the county or state) as of the Pre-Application Submission in the "Pre-Application Notification Certification Form" provided in the Pre-Application.

(B) Not later than the date the Pre-Application is submitted, notification must be sent to all of the following individuals and entities by e-mail, fax or mail with registered receipt return or similar tracking mechanism in the format required in the "Pre-Application Notification Template" provided in the Pre-Application. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are not required to notify city officials, however, are required to notify county officials. Evidence of Notification is required in the form of a certification in the "Pre-Application Notification Certification Form" provided in the Pre-Application, although it is encouraged that Applicants retain proof of delivery of the notifications, to the persons or entities prescribed in clauses (i) - (ix) of this subparagraph, in the event that the Department requires proof of Notification. Evidence of proof of delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of receipt by the recipient for facsimile and electronic mail. Officials to be notified are those officials in office at the time the Pre-Application is submitted.

(i) Neighborhood Organizations on record with the state or county whose boundaries include the proposed Development Site as identified in subparagraph (A)(iii) of this paragraph;

(ii) Superintendent of the school district containing the Development;

(iii) Presiding officer of the board of trustees of the school district containing the Development;

(iv) Mayor of any municipality containing the Development;

(v) All elected members of the Governing Body of any municipality containing the Development;

(vi) Presiding officer of the Governing Body of the county containing the Development;

(vii) All elected members of the Governing Body of the county containing the Development;

(viii) State senator of the district containing the Development; and

(ix) State representative of the district containing the Development.

(C) Each such notice must include, at a minimum, all of the following:

(i) The Applicant's name, address, individual contact name and phone number;

(ii) The Development name, address, city and county;

(iii) A statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(iv) Statement of whether the Development proposes New Construction, reconstruction, Adaptive Reuse or Rehabilitation;

(v) The type of Development being proposed (single family homes, duplex, apartments, townhomes, high-rise etc.) and population being served (family, Intergenerational Housing, or elderly);

(vi) The approximate total number of Units and approximate total number of low-income Units;

(vii) The approximate percentage of Units serving each level of AMGI (e.g. 20% at 50% of AMGI, etc.) and the approximate percentage of Units that are market rate;

(viii) The number of Units and proposed rents (less utility allowances) for the low-income Units and the number of Units and the proposed rents for any market rate Units. Rents to be provided are those that are effective at the time of the Pre-Application, which are subject to change as annual changes in the area median income occur;

(ix) The amount of housing tax credits requested; and

(x) The expected completion date if credits are awarded.

(e) Pre-Application Results. Only Pre-Applications which have satisfied all of the Pre-Application Threshold Criteria requirements set forth in subsection (d) of this section and §50.9(i)(14) of this chapter, will be eligible for Pre-Application points. The order and scores of those Developments released on the Pre-Application Submission Log do not represent a commitment on the part of the Department or the Board to allocate tax credits to any Development and the Department bears no liability for decisions made by Applicants based on the results of the Pre-Application Submission Log. Inclusion of a Development on the Pre-Application Submission Log does not ensure that an Applicant will receive points for a Pre-Application.

§50.9. Application: Submission; Communication with Department Employees; Adherence to Obligations; Evaluation Process for Competitive Applications Under the State Housing Credit Ceiling; Evaluation Process for Tax-Exempt Bond Development Applications; Evaluation Process for Rural Rescue Applications Under the 2008 Credit Ceiling; Experience Pre-Certification Procedures; Threshold Criteria; Selection Criteria; Tiebreaker Factors; Staff Recommendations; American Recovery and Reinvestment Act.

(a) Application Submission. Any Applicant requesting a Housing Credit Allocation or a Determination Notice must submit an Application, and the required Application fee as described in §50.20 of this chapter, to the Department during the Application Acceptance Period. Only complete Applications will be accepted. All required volumes must be submitted as required by the Application Submission Procedures Manual and fully complete for submission with all required copies and received by the Department not later than 5:00 p.m. on the date the Application is due. A bookmarked electronic copy of all required volumes and exhibits, unless otherwise indicated in the Application Submission Procedures Manual, must be submitted in the format of a single file presented in the order as required by the Application Submission Procedures Manual on a CD-R (non-rewritable) clearly labeled with the report type, Development name, and Development location is required for submission and must be received by the Department not later than 5:00 p.m. on the date the Application is due. Only one Application may be submitted for a site in an Application Round. While the Application Acceptance Period is open, an Applicant may withdraw an Application and subsequently file a new Application utilizing the original Pre-Application Fee that was paid as long as no evaluation was performed by the Department. The Department is authorized, but not required, to request the Applicant to provide additional information it deems relevant to clarify information contained in the Application or to submit documentation for items it considers to be an Administrative Deficiency, including ineligibility criteria, site and development restrictions, and threshold and selection criteria documentation. (§2306.6708) An Applicant may not change or supplement any part of an Application in any manner after the filing deadline, and may not add any Set-Asides, increase the requested credit amount, or revise the Unit mix (both income levels and bedroom mixes), except in response to a direct request from the Department to remedy an Administrative Deficiency as further described in §50.3(2) of this chapter or by amendment of an Application after a commitment or allocation of tax credits as further described in §50.17(d) of this chapter.

(b) Ex Parte Communications.

(1) During the period beginning on the first date of the Application Acceptance Period and ending on the date the Board makes a final decision with respect to the approval of any Application in that Application Round, a member of the Board may not communicate with the following Persons:

(A) An Applicant or Related Party; and

(B) Any Person who is:

(i) Active in the construction, rehabilitation, ownership, or Control of the proposed Development, including:

(I) A General Contractor; and

(II) A Developer; and

(III) A General Partner, Principal or Affiliate of a General Partner or General Contractor; or

(ii) Employed as a consultant, lobbyist, or attorney by an Applicant or a Related Party.

(2) During the period beginning on the first date of the Application Acceptance Period and ending on the date the Board makes a final decision with respect to the approval of any Application in that Application Round, an employee of the Department may communicate about any Application with the following Persons:

(A) The Applicant or a Related Party; and

(B) Any Person who is:

(i) Active in the construction, rehabilitation, ownership, or Control of the proposed Development, including:

(I) A General Partner or General Contractor; and

(II) A Developer; and

(III) A Principal or Affiliate of a General Partner or General Contractor; or

(ii) Employed as a consultant, lobbyist or attorney by the Applicant or a Related Party.

(3) A communication under paragraph (2) of this subsection may be oral or in any written form, including electronic communication through the Internet, and must satisfy the following conditions:

(A) The communication must be restricted to technical or administrative matters directly affecting the Application;

(B) The communication must occur or be received on the premises of the Department during established business hours; and

(C) A record of the communication must be maintained and included with the Application for purposes of Board review and must contain the following information:

(i) The date, time, and means of communication;

(ii) The names and position titles of the Persons involved in the communication and, if applicable, the Person's relationship to the Applicant;

(iii) The subject matter of the communication; and

(iv) A summary of any action taken as a result of the communication.

(4) Notwithstanding paragraph (1) or (2) of this subsection, a Board member or Department employee may communicate without restriction with a Person listed in paragraph (1) or (2) of this subsection during any Board meeting or public hearing held with respect to the Application, but not during a recess or other non-record portion of the meeting or hearing.

(5) Paragraph (1) of this subsection does not prohibit the Board from participating in social events at which a Person with whom

communications are prohibited may or will be present, provided that all matters related to Applications to be considered by the Board will not be discussed.

(c) Adherence to Obligations. (§2306.6720, General Appropriation Act, Article VII, Rider 8(a)) All representations, undertakings and commitments made by an Applicant in the Application process for a Development, whether with respect to Threshold Criteria, Selection Criteria or otherwise, shall be deemed to be a condition to any Commitment Notice, Determination Notice, or Carryover Allocation for such Development, the violation of which shall be cause for cancellation of such Commitment Notice, Determination Notice, or Carryover Allocation by the Department, and if concerning the ongoing features or operation of the Development, shall be enforceable even if not reflected in the LURA. All such representations are enforceable by the Department and the tenants of the Development, including enforcement by administrative penalties for failure to perform, as stated in the representations and in accordance with the LURA. If a Development Owner does not produce the Development as represented in the Application; does not receive approval for an amendment to the Application by the Department prior to implementation of such amendment; or does not provide the necessary evidence for any points received by the required deadline:

(1) The Development Owner must provide a plan to the Department, for approval and subsequent implementation, that incorporates additional amenities to compensate for the non-conforming components; and

(2) The Board will opt either to terminate the Application and rescind the Commitment Notice, Determination Notice or Carryover Allocation Agreement as applicable or the Department must:

(A) Reduce the score for Applications for Competitive Housing Tax Credits that are submitted by an Applicant or Affiliate related to the Development Owner of the non-conforming Development by up to ten points for the two Application Rounds concurrent to, or following, the date that the non-conforming aspect, or lack of financing, was recognized by the Department of the need for the amendment; the placed in service date; or the date the amendment is accepted by the Board;

(B) Prohibit eligibility to apply for Housing Tax Credits for a Tax-Exempt Bond Development that are submitted by an Applicant or Affiliate related to the Development Owner of the non-conforming Development for up to twenty-four (24) months from the date that the non-conforming aspect, or lack of financing, was recognized by the Department of the need for the amendment; the placed in service date; or the date the amendment is accepted by the Board, less any time delay caused by the Department;

(C) In addition to, or in lieu of, the penalty in subparagraph (A) or (B) of this paragraph, the Board may assess a penalty fee of up to $1,000 per day for each violation.

(3) For amendments approved administratively by the Executive Director, the penalties in paragraph (2) of this subsection will not be imposed.

(d) Evaluation Process for Competitive Applications Under the State Housing Credit Ceiling. Applications submitted for competitive consideration under the State Housing Credit Ceiling will be reviewed according to the process outlined in this subsection. An Application, during any of these stages of review, may be determined to be ineligible as further described in §50.5 of this chapter; Applicants will be promptly notified in these instances.

(1) Set-Aside and Selection Criteria Review. All Applications will first be reviewed as described in this paragraph. Applications will be confirmed for eligibility for Set-Asides. Then, each Application will be preliminarily scored according to the Selection Criteria listed in subsection (i) of this section. When a particular scoring criterion involves multiple points, the Department will award points to the proportionate degree, in its determination, to which a proposed Development complied with that criterion. As necessary to complete this process only, Administrative Deficiencies may be issued to the Applicant. This process will generate a preliminary Department score for every Application.

(2) Application Review Assessment. Each Application will be assessed based on either the Applicant's self-score or the Department's preliminary score, region, and any Set-Asides that the Application indicates it is eligible for, consistent with paragraph (5) of this subsection. Those Applications that appear to be most competitive will be reviewed in detail for Eligibility and Threshold Criteria during the Application Round.

(3) Eligibility and Threshold Criteria Review. Applications that appear to be most competitive will be evaluated for eligibility under §50.5(a)(7) - (9), (b) - (f) and §50.6 of this chapter. The remaining portions of the Eligibility Review under §50.5 of this chapter will be performed in the Compliance Evaluation and Eligibility Review as described under paragraph (7) of this subsection. The most competitive Applications will also be evaluated against the Threshold Criteria under subsection (h) of this section. The same portions of the Threshold Criteria review may be performed in the Underwriting Evaluation and Criteria review for financial feasibility by the Department's Real Estate Analysis Division as described under paragraph (6) of this subsection. Applications not meeting Threshold Criteria will be notified of any Administrative Deficiencies, in each event the Applicant will be given an opportunity to correct such deficiencies. Applications not meeting Threshold Criteria after receipt and review of the Administrative Deficiency response will be terminated and the Applicant will be provided a written notice to that effect. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled. Not all Applications will be reviewed in detail for Threshold Criteria. To the extent that the review of Threshold Criteria documentation, or submission of Administrative Deficiency documentation, alters the score assigned to the Application, an Applicant will be notified of its final score.

(4) Administrative Deficiencies. If an Application contains Administrative Deficiencies pursuant to §50.3(2) of this chapter which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies. Because the review for Eligibility, Selection, Threshold Criteria, and review for financial feasibility by the Department's Real Estate Analysis Division may occur separately, Administrative Deficiency requests may be made during any of these reviews. The Department staff will request clarification or correction in a deficiency notice in the form of an e-mail, or if an e-mail address is not provided in the Application, by facsimile, and a telephone call (only if there has not been confirmation of the receipt of the e-mail within twenty-four (24) hours) to the Applicant and one other party identified by the Applicant in the Application advising that such a request has been transmitted. If Administrative Deficiencies are not clarified or corrected to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice, then for competitive Applications under the State Housing Credit Ceiling, five points shall be deducted from the Selection Criteria score for each additional day the deficiency remains unresolved. If Administrative Defi-

ciencies are not clarified or corrected by 5:00 p.m. on the seventh business day following the date of the deficiency notice, then the Application shall be terminated. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period. This Administrative Deficiency process applies to requests for information made by the Real Estate Analysis Division review.

(5) Subsequent Evaluation of Applications and Methodology for Award Recommendations to the Board. The Department will assign, as herein described, Developments for review for financial feasibility by the Department's Real Estate Analysis Division--in general these will be those Applications identified as most competitive and that meet the requirements of Eligibility and Threshold. However, an Application may be reviewed by the Real Estate Analysis Division prior to the completion of the Eligibility and Threshold reviews. This procedure will also be used in making recommendations to the Board as follows:

(A) Assignments will be determined by separately selecting the Applications with the highest scores in the At-Risk Set-Aside Statewide until the minimum requirements stated in §50.7(b) of this chapter are attained;

(B) Assignments will then be determined by selecting the Applications with the highest scores in the TRDO-USDA Allocation until the minimum requirements stated in §50.7(b) of this chapter are attained. If an Application in this Set-Aside involves Rehabilitation it will be attributed to, and come from the, At-Risk Set-Aside; if an Application in this Set-Aside involves New Construction it will be attributed to and come from the applicable Uniform State Service Region;

(C) Remaining funds within each Uniform State Service Region will then be selected based on the highest scoring Developments in each of the 26 sub-regions, regardless of Set-Aside, in accordance with the requirements under §50.7(a) of this chapter, without exceeding the credit amounts available for a Rural Regional Allocation and Urban Regional Allocation in each region. To the extent that Applications in the At-Risk and TRDO-USDA Set-Asides are not competitive enough within their respective Set-Asides, they will also be able to compete, with no Set-Aside preference, within their appropriate sub-region;

(D) If there are any tax credits set-aside for Developments in a Rural Area in a specific Uniform State Service Region that remain after allocation under subparagraph (C) of this paragraph those tax credits shall then be made available in any other Rural Area in the state to the Application in the most underserved Rural sub-region as compared to the Region's Rural Allocation. (§2306.111(d)(3)) This will be referred to as the Rural collapse;

(E) If there are any tax credits remaining in any sub-region after the Rural collapse, in the Rural Regional Allocation or Urban Regional Allocation, they then will be combined and made available to the Application in the most underserved sub-region as compared to the sub-region's allocation. This will be referred to as the statewide collapse;

(F) Staff will ensure that at least 10% of the State Housing Credit Ceiling is allocated to Qualified Nonprofit Organizations to satisfy the Nonprofit Set-Aside. If 10% is not met through the existing competitive process, then the Department will add the highest scoring Application by a Qualified Nonprofit Organization statewide until the 10% Nonprofit Set-Aside is met. Staff will ensure that at least 20% of the State Housing Credit Ceiling is allocated to Rural Developments. If this 20% minimum is not met through the existing competitive process, then the Department will add the highest scoring Rural Development Application statewide until the 20% Rural Development Set-Aside is met. Selection for each of the Set-Asides will take precedence over selection for the Rural Regional Allocation and Urban Regional Allocation. Funds for the Rural Regional Allocation or Urban Regional Allocation within a region, for which there are no eligible feasible Applications, will be redistributed as provided in §50.7(c) of this chapter, Redistribution of Credits. If the Department determines that an allocation recommendation would cause a violation of the $2 million limit described in §50.6(d) of this chapter, the Department will make its recommendation by selecting the Development(s) that most effectively satisfies(y) the Department's goals in meeting Set-Aside and regional allocation goals. Based on Application rankings, the Department shall continue to underwrite Applications until the Department has processed enough Applications satisfying the Department's underwriting criteria to enable the allocation of all available Housing Tax Credits according to regional allocation goals and Set-Aside categories. To enable the Board to establish a Waiting List, the Department shall underwrite as many additional Applications as necessary to ensure that all available Competitive Housing Tax Credits are allocated within the period required by law. (§2306.6710(a) - (f); §2306.111)

(6) Underwriting Evaluation and Criteria. The Department shall underwrite an Application to determine the financial feasibility of the Development and an appropriate level of Housing Tax Credits. In determining an appropriate level of Housing Tax Credits, the Department shall, at a minimum, evaluate the cost of the Development based on acceptable cost parameters as adjusted for inflation and as established by historical final cost certifications of all previous Housing Tax Credit allocations for the county in which the Development is to be located; if certifications are unavailable for the county, then the metropolitan statistical area in which the Development is to be located; or if certifications are unavailable under the county or the metropolitan statistical area, then the Uniform State Service Region in which the Development is to be located. Underwriting of a Development will include a determination by the Department, pursuant to the Code §42, that the amount of Housing Tax Credits recommended for commitment to a Development is necessary for the financial feasibility of the Development and its long-term viability as a qualified rent restricted housing property. In making this determination, the Department will use the Underwriting Rules and Guidelines, §1.32 of this title. An Applicant may not change or supplement any part of an Application in any manner after the filing deadline, and may not add any set-asides, change their credit amount, or revise their unit mix (both income levels and bedroom mixes), except in response to a direct request from Department staff to remedy an Administrative Deficiency as further described in §50.3(2) of this chapter or by amendment of an Application after a commitment or allocation of tax credits as further described in §50.17(d) of this chapter. To the extent that the review of Administrative Deficiency documentation during this review alters the score assigned to the Application, Applicants will be re-notified of their final score. Receipt of feasibility points under subsection (i)(1) of this section does not ensure that an Application will be considered feasible during the feasibility evaluation by the Real Estate Analysis Division and conversely, a Development may be found feasible during the feasibility evaluation by the Real Estate Analysis Division even if it did not receive points under subsection (i)(1) of this section. (§2306.6710 and §2306.11)

(A) The Department may have an external party perform the underwriting evaluation to the extent it determines appropriate. The expense of any external underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation.

(B) The Department will reduce the Applicant's estimate of Developer's and/or General Contractor fees in instances where

these exceed the fee limits determined by the Department. In the instance where the General Contractor is an Affiliate of the Development Owner and both parties are claiming fees, General Contractor's overhead, profit, and general requirements, the Department shall be authorized to reduce the total fees estimated to a level that it determines to be reasonable under the circumstances. Further, the Department shall deny or reduce the amount of Housing Tax Credits allocated with respect to any portion of costs which it deems excessive or unreasonable. Excessive or unreasonable costs may include Developer fee attributable to Related Party acquisition costs. The Department also may require bids or Third Party estimates in support of the costs proposed by any Applicant. The Developer's fee limits will be calculated as follows:

(i) New construction, the Developer fee cannot exceed 15% of the project's Total Eligible Basis, less Developer fees, or 20% of the project's Total Eligible Basis, less Developer fees if the Development proposes 49 total Units or less; and

(ii) Acquisition/rehabilitation Developments, the acquisition portion of the Developer fee cannot exceed 15% of the existing structures acquisition basis, less Developer fee if the Development proposes 50 total Units or more, or 20% of the project's Total Eligible Basis, less Developer fees if the Development proposes 49 total Units or less, and will be limited to 4% credits. The rehabilitation portion of the Developer fee cannot exceed 15% of the total rehabilitation basis, less Developer fee if the Development proposes 50 total Units or more, or 20% of the project's Total Eligible Basis, less Developer fees if the Development proposes 49 total Units or less.

(7) Compliance Evaluation and Eligibility Review. After the Department has determined which Developments will be reviewed for financial feasibility, those same Developments will be reviewed for evaluation of the compliance status by the Department's Portfolio Management and Compliance Division, in accordance with Chapter 60 of this title, and will be evaluated in detail for eligibility under §50.5(a) - (f) of this chapter.

(8) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by the Department or its assigns. Such inspection will evaluate the Development Site based upon the criteria set forth in the Site Evaluation form provided in the Application and the inspector shall provide a written report of such site evaluation. The evaluations shall be based on the condition of the surrounding neighborhood, including appropriate environmental and aesthetic conditions and proximity to retail, medical, recreational, and educational facilities, and employment centers. The site's appearance to prospective tenants and its accessibility via the existing transportation infrastructure and public transportation systems shall be considered. "Unacceptable" sites include, without limitation, those containing a non-mitigable environmental factor that may adversely affect the health and safety of the residents. For Developments applying under the TRDO-USDA Set-Aside, the Department may rely on the physical site inspection performed by TRDO-USDA.

(e) Evaluation Process for Tax-Exempt Bond Development Applications. Applications submitted for consideration as Tax-Exempt Bond Developments will be reviewed according to the process outlined in this subsection. An Application, during any of these stages of review, may be determined to be ineligible as further described in §50.5 of this chapter; Applicants will be promptly notified in these instances.

(1) Eligibility and Threshold Criteria Review. All Tax-Exempt Bond Development Applications will first be reviewed as described in this paragraph. Tax-Exempt Bond Development Applications will be confirmed for eligibility under §50.5 and §50.6 of this chapter and Applications will be evaluated in detail against the Threshold Criteria. Tax-Exempt Bond Development Applications found to be ineligible and/or not meeting Threshold Criteria will be notified of any Administrative Deficiencies, in each event the Applicant will be given an opportunity to correct such deficiencies. Applications not meeting the Threshold Criteria after receipt and review of the Administrative Deficiency response will be terminated and the Applicant will be provided a written notice to that effect. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled.

(2) Administrative Deficiencies. If an Application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies. The Administrative Deficiency process may not be used by an Applicant or the Department to change the initial application proposal. Because the review for Eligibility, Threshold Criteria, and review for financial feasibility by the Department's Real Estate Analysis Division may occur separately, Administrative Deficiency requests may be made during any of these reviews. The Department staff will request clarification or correction in a deficiency notice in the form of an e-mail, or if an e-mail address is not provided in the Application, by facsimile, and a telephone call (only if there has not been confirmation of the receipt of the e-mail within twenty-four (24) hours) to the Applicant and one other party identified by the Applicant in the Application advising that such a request has been transmitted. All Administrative Deficiencies shall be clarified or corrected to the satisfaction of the Department within five (5) business days. Failure to resolve all outstanding deficiencies by 5:00 p.m. on the fifth business day following the date of the deficiency notice will result in a penalty fee of $500 for each business day the deficiency remains unresolved. Applications with unresolved deficiencies after 5:00 p.m. on the tenth day following the date of the deficiency notice will be terminated. The Applicant will be responsible for the payment of fees accrued pursuant to this paragraph regardless of any termination pursuant to §50.5(b)(4) of this chapter. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period. The Application will not be presented to the Board for consideration until all outstanding fees have been paid. This Administrative Deficiency process applies equally to the Real Estate Analysis Division review and feasibility evaluation and the same penalty and termination will be assessed.

(3) Underwriting and Compliance Evaluation and Criteria. The Department will assign all eligible Tax-Exempt Bond Development Applications meeting the eligibility and threshold requirements for review for financial feasibility by the Department's Real Estate Analysis Division, or the Department may have an external party perform the underwriting evaluation to the extent it determines appropriate. The expense of any external underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation. The Department or external party shall underwrite an Application to determine the financial feasibility of the Development and an appropriate level of Housing Tax Credits as further described in subsection (d)(6) of this section. Tax-Exempt Bond Development Applications will also be reviewed for evaluation of the compliance status by the Department's Portfolio Management and Compliance Division in accordance with Chapter 60, Subchapter A of this title.

(4) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by the Department or its assigns as further described in subsection (d)(8) of this section.

(f) Evaluation Process for Rural Rescue Applications Under the 2011 Credit Ceiling. Applications submitted for consideration as Rural Rescue Applications pursuant to §50.10(c) of this chapter under the 2010 Credit Ceiling will be reviewed according to the process outlined in this subsection. A Rural Rescue Application, during any of these stages of review, may be determined to be ineligible as further described in §50.5 of this chapter; Applicants will be promptly notified in these instances.

(1) Procedures for Intake and Review.

(A) Applications for Rural Rescue deals may be submitted between March 2, 2010 and November 15, 2010 and must be submitted in accordance with §50.21 of this chapter. A complete Application must be submitted at least forty (40) days prior to the date of the Board meeting at which the Applicant would like the Board to act on the proposed Development. Applications must include the full Application Fee as further described in §50.20(c) of this chapter. Applicants must submit documents in accordance with the procedures set out in the 2010 Application Submission Procedures Manual for Volumes I, II, III and IV. Volume IV, evidencing Selection Criteria, MUST be submitted.

(B) Applicants do not need to participate in the Pre-Application process outlined in §50.8 of this chapter, nor will they need to submit pre-certification documents identified in subsection (g) of this section.

(C) Applications will be processed on a first-come, first-served basis. Applications unable to meet all deficiency and underwriting requirements within thirty (30) days of the request by the Department, will remain under consideration, but will lose their submission status and the next Application in line will be moved ahead in order to expedite those Applications most able to proceed. Applications for Rural Rescue will be processed and evaluated as described in this paragraph. Applications will be reviewed to ensure that the Application is eligible as a rural "rescue" Development as described in paragraph (2) of this subsection.

(D) Prior to the Development being recommended to the Board, TRDO-USDA must provide the Department with a copy of the physical site inspection report performed by TRDO-USDA, as provided in subsection (d)(8) of this section.

(2) Eligibility Review. All Rural Rescue Applications will first be reviewed as described in this paragraph and eligibility will be confirmed pursuant to §50.5 and §50.6 of this chapter and the criteria listed in subparagraphs (A) - (C) of this paragraph. Applications found to be ineligible will be notified.

(A) Applications must be funded through TRDO-USDA;

(B) Applications must able to provide evidence that the loan:

(i) has been foreclosed and is in the TRDO-USDA inventory; or

(ii) is being foreclosed; or

(iii) is being accelerated; or

(iv) is in imminent danger of foreclosure or acceleration; or

(v) is for an Application in which two adjacent parcels are involved, of which at least one parcel qualifies under clauses (i) - (iv) of this subparagraph and for which the Application is submitted under one ownership structure, one financing plan and for which there are no market rate units; and

(C) Applicants must be identified as in compliance with TRDO-USDA regulations.

(3) Threshold Review. Applications will be evaluated in detail against the Threshold Criteria. Applications found to be ineligible and/or not meeting Threshold Criteria will be notified of any Administrative Deficiencies, in which event the Applicant is given an opportunity to correct such deficiencies. Applications not meeting Threshold Criteria after receipt and review of the Administrative Deficiency response will be terminated and the Applicant will be provided a written notice to that effect. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled. Not all Applications will be reviewed in detail for Threshold Criteria.

(4) Selection Criteria Review. All Rural Rescue Applications will be evaluated against the Selection Criteria and a score will be assigned to the Application. The minimum score for Selection Criteria is not required to be achieved to be eligible.

(5) Administrative Deficiencies. If an Application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies as further described in subsection (d)(4) of this section.

(6) Underwriting and Compliance Evaluation and Criteria. The Department will further review all eligible Rural Rescue Applications for financial feasibility by the Department's Real Estate Analysis Division, or the Department may have an external party perform the underwriting evaluation to the extent it determines appropriate and in accordance with the underwriting rules in §§1.31 - 1.36 of this title. The expense of any external underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation. The Department or external party shall underwrite an Application to determine the financial feasibility of the Development and an appropriate level of Housing Tax Credits as further described in subsection (d)(6) of this section. Rural Rescue Development Applications will also be reviewed for evaluation of the previous participation by the Department's Portfolio Management and Compliance Division in accordance with Chapter 60 of this title.

(7) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by the Department or its assigns as further described in subsection (d)(8) of this section.

(8) Credit Ceiling and Applicability of this chapter. All Rural Rescue Applicants will receive their credit allocation out of the 2010 Credit Ceiling and therefore, will be required to follow the rules and guidelines identified in the 2010 Qualified Allocation Plan and Rules (QAP). However, because the 2010 QAP will not be in effect during the time period that the Rural Rescue Applications can be submitted, Applications submitted and eligible under the Rural Rescue Set-Aside will be considered by the Board to have satisfied the requirements of the 2010 QAP and are waived from 2010 QAP requirements that are changes from the 2010 QAP, to the extent permitted by statute.

(9) Procedures for Recommendation to the Board. Consistent with subsection (k) of this section, staff will make its recommenda-

tion to the Committee. The Committee will make commitment recommendations to the Board. Staff will provide the Board with a written, documented recommendation which will address at a minimum the financial and programmatic viability of each Application and a breakdown of which Selection Criteria were met by the Applicant. The Board will make its decision based on §50.10(a) of this chapter. Any award made to a Rural Rescue Development will be credited against the TRDO-USDA Set-Aside for the 2010 Application Round, as required under subsection (d)(5) of this section.

(10) Limitation on Allocation. No more than $350,000 in credits will be forward committed from the 2010 State Housing Credit Ceiling. To the extent Applications are received that exceed the maximum limitation; staff will prepare the award for Board consideration noting for the Board that the award would require a waiver of this limitation.

(g) Experience Pre-Certification Procedures. No later than fourteen (14) days prior to the close of the Application Acceptance Period for Competitive Housing Tax Credit Applications, an Applicant must submit the documents required in this subsection to obtain the required pre-certification. For Applications submitted for Tax-Exempt Bond Applications or Applications not applying for Competitive Housing Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.) all of the documents in this section must be submitted with the Application. Upon receipt of the evidence required under this section, a certification from the Department will be provided to the Applicant for inclusion in its Application(s). Evidence must show that one of the Principals of the Development Owner, General Partner or the Developer have a record of successfully constructing or developing residential units (single family or multifamily) in the capacity of owner, General Partner or Developer. The individual requesting the certification must have completed the same type construction as the Application for tax credits is proposing (i.e. multifamily dwellings or single family residences). If rehabilitation experience is being claimed to qualify for an Application involving New Construction, then the rehabilitation must have been substantial and involved at least $15,000 of direct hard cost per unit.

(1) The term "successfully" is defined as acting in a capacity as the owner, General Partner, or Developer of:

(A) At least 200 residential units or, if less than 200 residential units, 80% of the total number of Units the Applicant is applying to build (e.g. you must have 40 units successfully built to apply for 50 Units); or

(B) At least 36 residential units if the Development is a Rural Development; or

(C) At least 25 residential units if the Development has 36 or fewer total Units.

(2) One or more of the following documents must be submitted: American Institute of Architects (AIA) Document A111 - Standard Form of Agreement Between Owner & Contractor, AIA Document G704 - Certificate of Substantial Completion, AIA Document G702 - Application and Certificate for Payment, Certificate of Occupancy, IRS Form 8609, HUD Form 9822, development agreements, partnership agreements, or other documentation satisfactory to the Department verifying that the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), Developer or their Principals have the required experience. If submitting the IRS Form 8609, only one form per Development is required. The evidence must clearly indicate:

(A) That the Development has been completed (i.e. Development Agreements, Partnership Agreements, etc. must be accompanied by certificates of completion);

(B) That the names on the forms and agreements tie back to the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), Developer or their Principals as listed in the Application; and

(C) The number of units completed or substantially completed.

(h) Threshold Criteria. The following Threshold Criteria listed in this subsection are mandatory requirements that must be submitted at the time of Application submission unless specifically indicated otherwise:

(1) Completion and submission of the Application, which includes the entire Uniform Application and any other supplemental forms which may be required by the Department. (§2306.1111)

(2) Completion and submission of the Site Packet as provided in the Application.

(3) Set-Aside Eligibility. Documentation must be provided that confirms eligibility for all Set-Asides under which the Application is seeking funding as required in the Application.

(4) Certifications. The "Certification Form" provided in the Application confirming the following items:

(A) A certification of the basic amenities selected for the Development. All Developments must meet at least the minimum threshold of points. These points are not associated with the selection criteria points in subsection (i) of this section. The amenities selected must be made available for the benefit of all tenants. If fees in addition to rent are charged for amenities reserved for an individual tenant's use, then the amenity may not be included among those provided to satisfy this requirement. Developments must provide a minimum number of common amenities in relation to the Development size being proposed. The amenities selected must be selected from clause (ii) of this subparagraph and made available for the benefit of all tenants. Developments proposing Rehabilitation (excluding Reconstruction) or proposing Single Room Occupancy will receive 1.5 points for each point item (do not round). Applications for non-contiguous scattered site housing, including New Construction, reconstruction, Adaptive Reuse, Rehabilitation, and single-family design, will have the threshold test applied based on the number of Units per individual site, and must submit a separate certification for each individual site under control by the Applicant. Any future changes in these amenities, or substitution of these amenities, must be approved by the Department in accordance with §50.17(d) of this chapter and may result in a decrease in awarded credits if the substitution or change includes a decrease in cost, or in the cancellation of a Commitment Notice or Carryover Allocation if all of the Common Amenities claimed are no longer met.

(i) Applications must meet a minimum threshold of points (based on the total number of Units in the Development) as follows:

(I) Total Units are less than 16, 0 points are required to meet Threshold for Single Room Occupancy and 1 point is required to meet threshold for all other Developments;

(II) Total Units are 16 to 24, 2 points are required to meet Threshold;

(III) Total Units are 25 to 40, 3 points are required to meet Threshold;

(IV) Total Units are 41 to 76, 6 points are required to meet Threshold;

(V) Total Units are 77 to 99, 9 points are required to meet Threshold;

(VI) Total Units are 100 to 149, 12 points are required to meet Threshold;

(VII) Total Units are 150 to 199, 15 points are required to meet Threshold; or

(VIII) Total Units are 200 or more, 18 points are required to meet Threshold.

(ii) Amenities for selection include those items listed in subclauses (I) - (XXV) of this clause. Both Developments designed for families and Qualified Elderly Developments can earn points for providing each identified amenity unless the item is specifically restricted to one type of Development. All amenities must meet accessibility standards as further described in subparagraphs (D) and (F) of this paragraph. An Application can only count an amenity once, therefore combined functions (a library which is part of a community room) only count under one category. Spaces for activities must be sized appropriately to serve the anticipated population.

(I) Full perimeter fencing (2 points);

(II) Controlled gate access (1 point);

(III) Gazebo w/sitting area (1 point);

(IV) Accessible walking/jogging path separate from a sidewalk (1 point);

(V) Community laundry room with at least one front loading washer (1 point);

(VI) Barbecue grill and picnic table--at least one of each for every 50 Units (1 point);

(VII) Covered pavilion that includes barbecue grills and tables (2 points);

(VIII) Swimming pool (3 points);

(IX) Furnished fitness center equipped with a minimum of two of the following fitness equipment options with at least one option per every 40 Units or partial increment of 40 Units: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, multi-functional weight bench, sauna, stair climber, etc. The maximum number of equipment options required for any Development, regardless of number of Units, shall be five (2 points);

(X) Equipped and functioning business center or equipped computer learning center with 1 computer for every 30 Units proposed in the Application, 1 printer for every 3 computers (with minimum of one printer), and 1 fax machine (2 points);

(XI) Furnished Community room (1 point);

(XII) Library with an accessible sitting area (separate from the community room) (1 point);

(XIII) Enclosed sun porch or covered community porch/patio (2 points);

(XIV) Service coordinator office in addition to leasing offices (1 point);

(XV) Senior Activity Room (Arts and Crafts, etc.) (2 points);

(XVI) Health Screening Room (1 point);

(XVII) Secured Entry (elevator buildings only) (1 point);

(XVIII) Horseshoe pit, putting green or shuffleboard court (1 point);

(XIX) Community Dining Room w/full or warming kitchen (3 points);

(XX) One Children's Playscape Equipped for 5 to 12 year olds, or one Tot Lot (1 point);

(XXI) Two Children's Playscapes Equipped for 5 to 12 year olds, two Tot Lots, or one of each (2 points);

(XXII) Sport Court (Tennis, Basketball or Volleyball) (2 points);

(XXIII) Furnished and staffed Children's Activity Center (3 points);

(XXIV) Community Theater Room equipped with a 52 inch or larger screen with surround sound equipment; DVD player; and theater seating (3 points); or

(XXV) Green Building amenities (Rehabilitation Developments will receive 1.5 points for each point requested for the green building amenities):

(-a-) passive solar heating/cooling (3 points maximum);

(-1-) Two points if the glazing area on the north- and south-facing walls of the building is at least 50% greater than the sum of the glazing area on the east- and west-facing walls; and the east-west axis of the building is within 15 degrees of due east-west;

(-2-) One point if in addition to the above, if the project utilizes a narrow floor plate (less than 40 feet) and single loaded corridors to optimize daylight penetration and passive ventilation; and solar screens or solar film on all East, West, and South Windows with building oriented to east-west axis within 15 degrees of due east-west, west-south axis within 15 degrees of due west-south, and south-east axis within 15 degrees of due south-east;

(-b-) water conserving features (2 points maximum, 1 point for each):

(-1-) Install high efficiency toilets using less than or equal to 1.28 gallons/flush or WaterSense certified;

(-2-) Install bathroom lavatory faucets and showerheads that do not exceed 2.0 gallons/minute and kitchen faucets that do not exceed 1.5 gallons/minute. Applies to all fixtures throughout the development. Rehab projects may choose to install compliant faucet aerators instead of replacing entire faucets;

(-c-) Provide solar water heaters designed to provide at least 25% of the average energy used to heat domestic water throughout the entire development.) (2 points);

(-d-) irrigation and landscaping (2 points):

(-1-) collected water (at least 50%) for irrigation purposes;

(-2-) selection of native trees and plants that are appropriate to the site's soils and microclimate;

(-e-) sub-metered utility meters (2 points maximum);

(-1-) Sub-metered utility meters on rehab project without existing sub-meters or new construction senior project (2 points); or

(-2-) Sub-metered utility meters on new construction project (excluding new construction senior project) (1 point);

(-f-) energy efficiency (4 points maximum);

(-1-) Three points if the development uses Energy-Star qualified windows and glass doors exclusively; insulation, and air barriers greater than or equal to Energy Star air barrier and insulation criteria; and HVAC, and domestic hot water heaters, or insulation that exceeds Energy Star standards; or

(-2-) Four points if the project promotes energy efficiency by meeting the requirements of Energy Star for Homes by either complying with the appropriate builder option package or a HERS score of 85;

(-g-) thermally and draft efficient doors (SHGC of 0.40 or lower and U-value specified by climate zone according to the 2006 IECC) (2 points);

(-h-) photovoltaic panels for electricity and design and wiring for the use of such panels (3 points maximum);

(-1-) Photovoltaic panels that total 10 kW (1 point);

(-2-) Photovoltaic panels that total 20 kW (2 points);

(-3-) Photovoltaic panels that total 30 kW (3 points);

(-i-) construction waste management to divert a minimum of 50% of construction waste from landfills;

(-j-) implementation of EPA's Best Management Practices for erosion and sedimentation control during construction (1 point);

(-k-) recycling service provided throughout the compliance period (1 point);

(-l-) water permeable paving and walkways (at least 20% of walkways and parking) (1 point);

(-m-) renewable materials, provide at least one of the following: bamboo flooring, wool carpet, linoleum flooring, straw board cabinetry, poplar OSB, or cotton batt insulation (1 point);

(-n-) healthy flooring, provide at least one of the following for 50% of flooring: finished concrete ceramic tile. a resilient flooring material that is Floor Score Certified, applied with a Floor Score Certified adhesive and comes with a minimum seven (7) year wear through warranty (1 point);

(-o-) healthy finish materials, use paints, stains, adhesives, and sealants consistent with the Green Seal 11 standard or other applicable Green Seal standards (1 point);

(B) A certification that the Development will have all of the following Amenities at no charge to the tenants. All New Construction or Reconstruction Units must provide the amenities in clauses (i) - (viii) of this subparagraph. Rehabilitation (excluding Reconstruction) and Adaptive Reuse must provide the amenities in clauses (ii) - (viii) of this subparagraph unless expressly identified as not required. (§2306.187)

(i) All New Construction Units must be wired with RG-6 COAX or better and CAT3 phone cable or better, wired to each bedroom, dining room and living room;

(ii) Blinds or window coverings for all windows;

(iii) Disposal and Energy-Star or equivalently rated dishwasher (not required for TRDO-USDA or SRO Developments);

(iv) Energy-Star or equivalently rated Refrigerator (not required for SRO Developments);

(v) Oven/Range (not required for SRO Developments);

(vi) Exhaust/vent fans (vented to the outside) in bathrooms;

(vii) Energy-Star or equivalently rated ceiling fans in living areas and bedrooms; and

(viii) Energy-Star or equivalently rated lighting in all Units, which may include compact florescent bulbs.

(C) A certification that the Development will meet the minimum threshold for size of Units as provided in clauses (i) - (v) of this subparagraph. These minimum requirements are not associated with the Selection Criteria points in subsection (i) of this section. Developments proposing Rehabilitation (excluding Reconstruction) or Single Room Occupancy will not be subject to the requirements of this subparagraph.

(i) 550 square feet for an efficiency Unit;

(ii) 650 square feet for a one Bedroom Unit that is not in a Qualified Elderly Development nor an age restricted unit in an Intergenerational Development; 550 square feet for a one Bedroom Unit in a Qualified Elderly Development or an age restricted unit in an Intergenerational Development;

(iii) 900 square feet for a two Bedroom Unit that is not in a Qualified Elderly Development nor an age restricted unit in an Intergenerational Development; 700 square feet for a two Bedroom Unit in a Qualified Elderly Development or an age restricted unit in an Intergenerational Development;

(iv) 1,000 square feet for a three Bedroom Unit; and

(v) 1,200 square feet for a four Bedroom Unit.

(D) A certification that the Development will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies, and will adhere to local building codes or if no local building codes are in place then to the most recent version of the International Building Code.

(E) A certification that the Applicant is in compliance with state and federal laws, including but not limited to, fair housing laws, including Chapter 301, Property Code, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§3601 et seq.), and the Fair Housing Amendments Act of 1988 (42 U.S.C. §§3601 et seq.); the Civil Rights Act of 1964 (42 U.S.C. §§2000a et seq.); the Americans with Disabilities Act of 1990 (42 U.S.C. §§12101 et seq.); the Rehabilitation Act of 1973 (29 U.S.C. §§701 et seq.); Fair Housing Accessibility; the Texas Fair Housing Act; and that the Development is designed consistent with the Fair Housing Act Design Manual produced by HUD, the Code Requirements for Housing Accessibility 2000 (or as amended from time to time) produced by the International Code Council and the Texas Accessibility Standards. (§2306.257; §2306.6705(7))

(F) A certification that the Applicant will attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses, and that the Applicant will submit a report at least once in each 90-day period following the date of the Commitment Notice until the Cost Certification is submitted, in a format prescribed by the Department and provided at the time a Commitment Notice is received, on the percentage of businesses with which the Applicant has contracted that qualify as Minority Owned Businesses. (§2306.6734)

(G) Pursuant to §2306.6722, any Development supported with a Housing Tax Credit allocation shall comply with the

accessibility standards that are required under §504, Rehabilitation Act of 1973 (29 U.S.C. §794), and specified under 24 C.F.R. Part 8, Subpart C. The Applicant must provide a certification from the Development engineer, an accredited architect or Department-approved third party accessibility specialist, that the Development will comply with the accessibility standards that are required under §504, Rehabilitation Act of 1973 (29 U.S.C. §794), and specified under 24 C.F.R. Part 8, Subpart C and this subparagraph. (§2306.6722 and §2306.6730)

(H) For Developments involving New Construction (excluding New Construction of non-residential buildings) where some Units are two-stories or single family design and are normally exempt from Fair Housing accessibility requirements, a minimum of 20% of each Unit type (i.e. one bedroom, two bedroom, three bedroom) must provide an accessible entry level and all common-use facilities in compliance with the Fair Housing Guidelines, and include a minimum of one bedroom and one bathroom or powder room at the entry level. A similar certification will also be required after the Development is completed from an inspector, architect, or accessibility specialist.

(I) A certification that the Development will be equipped with energy saving devices that meet the standard statewide energy code adopted by the state energy conservation office, unless historic preservation codes permit otherwise for a Development involving historic preservation. All Units must be air-conditioned. The measures must be certified by the Development architect as being included in the design of each tax credit Unit at the time the 10% Test Documentation is submitted and in actual construction upon Cost Certification. (§2306.6725(b)(1))

(J) A certification that the Development will be built by a General Contractor that satisfies the requirements of the General Appropriation Act, Article VII, Rider 8(c) applicable to the Department which requires that the General Contractor hired by the Development Owner or the Applicant, if the Applicant serves as General Contractor, must demonstrate a history of constructing similar types of housing without the use of federal tax credits.

(K) A certification that the Development Owner agrees to establish a reserve account consistent with §2306.186, Texas Government Code and as further described in §1.37 of this title.

(L) A certification that the Applicant, Developer, or any employee or agent of the Applicant has not formed a Neighborhood Organization for purposes of subsection (i)(2) of this section, has not given money or a gift to cause the Neighborhood Organization to take its position of support or opposition, nor has provided any assistance to a Neighborhood Organization to meet the requirements under subsection (i)(2) of this section which are not allowed under that subsection, as it relates to the Applicant's Application or any other Application under consideration in 2010.

(M) Operate in accordance with the requirements pertaining to rental assistance in Chapter 60 of this title.

(N) A certification that the Development Owner will contract with a Management Company throughout the Compliance Period that will perform criminal background checks on all adult tenants, head and co-head of households.

(5) Design Items. This exhibit will provide:

(A) All of the architectural drawings identified in clauses (i) - (iii) of this subparagraph. While full size design or construction documents are not required, the drawings must have an accurate and legible scale and show the dimensions. All Developments involving New Construction, or conversion of existing buildings not configured in the Unit pattern proposed in the Application, must provide all of the items identified in clauses (i) - (iii) of this subparagraph. For Developments involving Rehabilitation for which the Unit configurations are not being altered, only the items identified in clauses (i) and (iii) of this subparagraph are required:

(i) A site plan which:

(I) Is consistent with the number of Units and Unit mix specified in the "Rent Schedule" provided in the Application;

(II) Is consistent with the number of buildings and building type/unit mix specified in the "Building/Unit Configuration" provided in the Application; and

(III) Identifies all residential and common buildings;

(ii) Floor plans and elevations for each type of residential building and each common area building clearly depicting the height of each floor and a percentage estimate of the exterior composition. Adaptive Reuse Developments, are only required to provide building plans delineating each unit by number, type and area consistent with those in the "Rent Schedule" and pictures of each elevation of the existing building depicting the height of each floor and percentage estimate of the exterior composition; and

(iii) Unit floor plans for each type of Unit. The Net Rentable Areas these Unit floor plans represent should be consistent with those shown in the "Rent Schedule" and "Building/Unit Configuration" provided in the Application. Adaptive Reuse Developments, are only required to provide Unit floor plans for each distinct typical Unit type (i.e. one-bedroom, two-bedroom) and for all Units types that vary in Net Rentable Area by 10% from the typical Unit; and

(B) A boundary survey of the proposed Development Site and of the property to be purchased. In cases where more property is purchased than the proposed Development Site, the survey or plat must show the survey calls for both the larger site and the Development Site. The survey must clearly delineate the flood plain boundary lines and show all easements. The survey does not have to be recent; but it must show the property purchased and the property proposed for the Development Site. In cases where the Development Site is only a part of the site being purchased, the depiction or drawing of the Development Site may be professionally compiled and drawn by an architect, engineer or surveyor.

(6) Evidence of the Development's development costs and corresponding credit request and syndication information as described in subparagraphs (A) - (G) of this paragraph.

(A) A written narrative describing the financing plan for the Development, including any non-traditional financing arrangements; the use of funds with respect to the Development; the funding sources for the Development including construction, permanent and bridge loans, rents, operating subsidies, and replacement reserves; and the commitment status of the funding sources for the Development. This information must be consistent with the information provided throughout the Application. (§2306.6705(1))

(B) All Developments must submit the "Development Cost Schedule" provided in the Application. This exhibit must have been prepared and executed not more than six (6) months prior to the close of the Application Acceptance Period.

(C) Provide a letter of commitment from a syndicator that, at a minimum, provides an estimate of the amount of equity dollars expected to be raised for the Development in conjunction with the amount of Housing Tax Credits requested for allocation to the Development Owner, including pay-in schedules, syndicator consulting fees

and other syndication costs. No syndication costs should be included in the Eligible Basis. (§2306.6705(2) and (3))

(D) For Developments located in a Qualified Census Tract (QCT) as determined by the Secretary of HUD or otherwise qualifying for a 30% increase in Eligible Basis, pursuant to the Code, §42(d)(5)(C) or §50.6(h)(3) and (4) of this chapter, if permitted under §50.6(h) of this chapter, Applicants must submit a copy of the census map clearly showing that the proposed Development is located within a QCT. Census tract numbers must be clearly marked on the map, and must be identical to the QCT number stated in the Department's Reference Manual.

(E) Rehabilitation Developments (including reconstruction) and Adaptive Reuse must submit a Property Condition Assessment meeting the requirements of paragraph (14)(C) of this subsection.

(F) If offsite costs are included in the budget as a line item, or embedded in the site acquisition contract, or referenced in the utility provider letters, then the supplemental form "Off Site Cost Breakdown" must be provided.

(G) If projected site work costs include unusual or extraordinary items or exceed $9,000 per Unit, then the Applicant must provide a detailed cost breakdown prepared by a Third Party engineer or architect, and a letter from a certified public accountant allocating which portions of those site costs should be included in Eligible Basis and which ones may be ineligible.

(7) Evidence of readiness to proceed as evidenced by at least one of the items under each of subparagraphs (A) - (D) of this paragraph:

(A) Evidence of Property control in the name of the Development Owner. If the evidence is not in the name of the Development Owner, then the documentation should reflect an expressed ability to transfer the rights to the Development Owner. All of the sellers of the proposed Property for the thirty-six (36) months prior to the first day of the Application Acceptance Period and their relationship, if any, to members of the Development team must be identified at the time of Application (not required at Pre-Application). One of the following items described in clauses (i) - (iii) of this subparagraph must be provided, and if the acquisition can be characterized as an identity of interest transaction as described in §1.32 of this title, items described in clause (iv) of this subparagraph must also be provided:

(i) A recorded warranty deed with corresponding executed settlement statement, unless required to submit items under clause (iv) of this subparagraph; or

(ii) A contract for lease (the minimum term of the lease must be at least forty-five (45) years) which is valid for the entire period the Development is under consideration for tax credits; or

(iii) A contract for sale, an exclusive option to purchase or a lease which is valid for the entire period the Development is under consideration for tax credits. For Tax Exempt Bond Development Applications, site control must be valid through December 1, 2009 with option to extend through March 1, 2010 (Applications submitted for lottery) or ninety (90) days from the date of the bond reservation with the option to extend through the scheduled TDHCA Board meeting at which the award of Housing Tax Credits will be considered (Applications not submitted for lottery). The potential expiration of site control does not warrant the Application being presented to the TDHCA Board prior to the scheduled meeting.

(iv) If the acquisition can be characterized as an identity of interest transaction, as described in §1.32 of this title, subclauses (I) - (III) of this clause, the Applicant must provide (not required at Pre-Application):

(I) Documentation of the original acquisition cost in the form of a settlement statement or, if a settlement statement is not available, the seller's most recent audited financial statement specifically indicating the asset value for the Development Site; and

(II) If the original acquisition cost evidenced by subclause (I) of this clause is less than the acquisition cost claimed in the Application;

(-a-) An appraisal meeting the requirements of paragraph (14)(D) of this subsection; and

(-b-) Any other verifiable costs of owning, holding, or improving the Property that, when added to the value from subclause (I) of this clause, justifies the Applicant's proposed acquisition amount.

(-1-) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include property taxes, interest expense, a calculated return on equity at a rate consistent with the historical returns of similar risks, the cost of any physical improvements made to the property, the cost of rezoning, replatting or developing the property, or any costs to provide or improve access to the property.

(-2-) For transactions which include existing buildings that will be rehabilitated or otherwise maintained as part of the Development, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the property, a calculated return on equity at a rate consistent with the historical returns of similar risks, and allow the cost of exit taxes not to exceed an amount necessary to allow the sellers to be made whole in the original and subsequent investment in the property and avoid foreclosure.

(III) In no instance will the acquisition cost utilized by the underwriter exceed the lesser of the original acquisition cost evidenced by subclause (I) of this clause plus costs identified in subclause (II)(-b-) of this clause, or the "as-is" value conclusion evidenced by subclause (II)(-a-) of this clause.

(v) As described in clauses (ii) and (iii) of this subparagraph, property control must be continuous. Closing on the property is acceptable, as long as evidence is provided that there was no period in which control was not retained.

(B) Evidence from the appropriate local municipal authority that satisfies one of clauses (i) - (iii) of this subparagraph. Documentation may be from more than one department of the municipal authority and must have been prepared and executed not more than six (6) months prior to the close of the Application Acceptance Period. (§2306.6705(5))

(i) For New Construction, Adaptive Reuse or reconstruction Developments, a letter from the chief executive officer of the Local Political Subdivision or another local official with appropriate jurisdiction stating that (For Tax-Exempt Bond Applications the items in subclauses (I) - (III) of this clause must be submitted no later than fourteen (14) days prior to the Board meeting when the housing tax credits will be considered):

(I) The Development is located within the boundaries of a Local Political Subdivision which does not have a zoning ordinance; and either subclause (II) or (III) of this clause;

(II) The letter must state that the Development is consistent with a local consolidated plan, comprehensive plan, or other local planning document that addresses affordable housing; or

(III) The letter must state that there is a need for affordable housing, if no such planning document exists.

(ii) For New Construction or reconstruction Developments, a letter from the chief executive officer of the Local Political Subdivision or another local official with appropriate jurisdiction stating that:

(I) The Development is permitted under the provisions of the zoning ordinance that applies to the location of the Development; or

(II) The Applicant is in the process of seeking the appropriate zoning and has signed and provided to the political subdivision a release agreeing to hold the political subdivision and all other parties harmless in the event that the appropriate zoning is denied. (§2306.6705(1)(B)) The Applicant must also provide at the time of Application a copy of the application for appropriate zoning filed with the local entity responsible for zoning approval and proof of delivery of that application in the form of a signed certified mail receipt, signed overnight mail receipt, or confirmation letter from said official. Final approval of appropriate zoning must be achieved and documentation of acceptable zoning for the Development, as proposed in the Application, must be provided to the Department at the time the Commitment Fee, or Determination Notice Fee, is paid. If this evidence is not provided with the Commitment Fee, any commitment of credits will be rescinded. No extensions may be requested for the deadline for submitting evidence of final approval of appropriate zoning.

(iii) For Rehabilitation Developments, documentation of current zoning is required. If the property is currently a non-conforming use as presently zoned, a letter from the chief executive officer of the political subdivision or another local official with appropriate jurisdiction which addresses the items in subclauses (I) - (IV) of this clause:

(I) A detailed narrative of the nature of non-conformance;

(II) The applicable destruction threshold;

(III) Owner's rights to reconstruct in the event of damage; and

(IV) Penalties for noncompliance.

(C) Evidence of interim and permanent financing sufficient to fund the proposed Total Housing Development Cost less any other funds requested from the Department and any other sources documented in the Application. Any local, state or federal financing identified in this section which restricts household incomes at any AMGI lower than restrictions required pursuant to the Rules must be identified in the Rent Schedule and the local, state or federal income restrictions must include corresponding rent levels that do not exceed 30% of the income limitation in accordance with §42(g) of the Code. The income and corresponding rent restrictions will be imposed by the Housing Tax Credit LURA and monitored throughout the extended use period. Such evidence must be consistent with the sources and uses of funds represented in the Application and shall be provided in one or more of the following forms described in clauses (i) - (iv) of this subparagraph:

(i) Bona fide financing in place as evidenced by:

(I) A valid and binding loan agreement; and

(II) Deed(s) of trust in the name of the Development Owner as grantor; or

(III) For TRDO-USDA §515 Developments involving, an executed TRDO-USDA letter indicating TRDO-USDA has received a Consent Request, also referred to as a Preliminary Submittal, as described in 7 CFR §3560.406 and a copy of the original loan documents; or

(ii) Bona fide commitment or term sheet for the interim and permanent loans issued by a lending institution or mortgage company that is actively and regularly engaged in the business of lending money which is addressed to the Development Owner and which has been executed by the lender (the term of the loan must be for a minimum of fifteen (15) years with at least a thirty (30) year amortization). The commitment must state an expiration date and all the terms and conditions applicable to the financing including the mechanism for determining the interest rate, if applicable, and the anticipated interest rate and any required Guarantors. Such a commitment may be conditional upon the completion of specified due diligence by the lender and upon the award of tax credits; or

(iii) Any Federal, State or local gap financing, whether of soft or hard debt, must be identified at the time of Application as evidenced by:

(I) Evidence from the lending agency that an application for funding has been made; and

(II) A term sheet which clearly describes the amount and terms of the funding, and the date by which the funding determination will be made and any commitment issued, must be submitted; and

(III) Evidence of application for funding from another Department program is not required except as indicated on the Uniform Application, as long as the Department funding is on a concurrent funding period with the Application submitted and the Applicant clearly indicates that such an Application has been filed as required by the Application Submission Procedures Manual; and

(IV) If the commitment from any funding source identified in this subparagraph has not been received by the date the Department's Commitment Notice is to be submitted, the Application will be reevaluated for financial feasibility. If the Application is infeasible without the funding source, the Commitment Notice may be rescinded; or

(iv) If the Development will be financed through more than 5% of Development Owner contributions, provide a letter from an Third Party CPA verifying the capacity of the Development Owner to provide the proposed financing with funds that are not otherwise committed together with a letter from the Development Owner's bank or banks confirming that sufficient funds are available to the Development Owner. Documentation must have been prepared and executed not more than six (6) months prior to the close of the Application Acceptance Period.

(D) Provide the documents in clauses (i) - (iii) of this subparagraph:

(i) A copy of the full legal description for the Development Site; and

(ii) A current valuation report from the county tax appraisal district and documentation of the current total property tax rate for the Development Site (unless the site is located on land that is not subject to federal, state or local property taxes); and

(iii) A copy of:

(I) The current title policy (or title status report if on Tribal Land) which shows that the ownership (or leasehold) of the Development Site is vested in the name of the Development Owner; or

(II) a current title commitment with the proposed insured matching the name of the Development Owner and the title

of the Development Site vested in the name of the seller or lessor as indicated on the sales contract, option or lease;

(III) If the title policy, title status report, or commitment is more than six (6) months old as of the day the Application Acceptance Period closes, then a letter from the title company/Bureau of Indian Affairs indicating that nothing further has transpired on the policy, title status report or commitment.

(8) Evidence in the form of a certification of all of the notifications described in the subparagraphs of this paragraph. Such notices must be prepared in accordance with the "Public Notifications" certification provided in the Application.

(A) Evidence in the form of a certification that the Applicant met the requirements and deadlines identified in clauses (i) - (iii) of this subparagraph. Notification must not be older than three (3) months from the first day of the Application Acceptance Period. (§2306.6705(9)) If evidence of these notifications was submitted with the Pre-Application Threshold for the same Application and satisfied the Department's review of Pre-Application Threshold, then no additional notification is required at Application, except that re-notification is required by tax credit Applicants who have submitted a change in the Application, whether from Pre-Application to Application or as a result of an Administrative Deficiency that reflects a total Unit increase of greater than 10%, a total increase of greater than 10% for any given level of AMGI, or a change to the population being served (elderly, Intergenerational Housing or family). For Applications submitted for Tax-Exempt Bond Developments or Applications not applying for Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.), notifications and proof thereof must not be older than three (3) months prior to the date the Volume III of the Application is submitted.

(i) The Applicant must request a list of Neighborhood Organizations on record with the county and state whose boundaries include the proposed Development Site from local elected officials as follows:

(I) No later than January 20, 2010 for Competitive Housing Tax Credit Applications (or for Tax-Exempt Bond Applications, Rural Rescue, or Applications not applying for Tax Credits, but applying only for other Multifamily Programs such as HOME, Housing Trust Fund, etc., not later than fourteen (14) days prior to submission of the Threshold documentation), the Applicant must e-mail, fax or mail with registered receipt a completed "Neighborhood Organization Request" letter as provided in the Application to the local elected official for the city and county where the Development is proposed to be located. If the Development is located in an Area that has district based local elected officials, or both at-large and district based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located an Area that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. If the Development is not located within a city or is located in the Extra Territorial Jurisdiction (ETJ) of a city, the county local elected official must be contacted. In the event that local elected officials refer the Applicant to another source, the Applicant must request Neighborhood Organizations from that source in the same format;

(II) If no reply letter is received from the local elected officials by February 19, 2010 (or For Tax-Exempt Bond Developments or Applications not applying for Tax Credits, but applying only for other Multifamily Programs such as HOME, Housing Trust Fund, etc., by seven (7) days prior to the submission of the Application), then the Applicant must certify to that fact in the "Application Notification Certification Form" provided in the Application;

(III) The Applicant must list all Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as outlined by the local elected officials, or that the Applicant has knowledge of as of the submission of the Application, in the "Application Notification Certification Form" provided in the Application.

(ii) Not later than the date the Application is submitted, notification must be sent to all of the following individuals and entities by e-mail, fax or mail with registered receipt return or similar tracking mechanism e-mail, fax or mail with registered receipt in the format required in the "Application Notification Template" provided in the Application. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are not required to notify city officials, however, are required to notify county officials. Evidence of Notification is required in the form of a certification in the "Application Notification Certification Form" provided in the Application, although it is encouraged that Applicants retain proof of delivery of the notifications, to the persons or entities prescribed in subclauses (I) - (IX) of this clause, in the event that the Department requires proof of Notification. Evidence of proof of delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of receipt by recipient for facsimile and electronic mail. Officials to be notified are those officials in office at the time the Application is submitted.

(I) Neighborhood Organizations on record with the state or county whose boundaries include the proposed Development Site as identified in clause (i)(III) of this subparagraph.

(II) Superintendent of the school district containing the Development;

(III) Presiding officer of the board of trustees of the school district containing the Development;

(IV) Mayor of the Governing Body of any municipality containing the Development;

(V) All elected members of the Governing Body of any municipality containing the Development;

(VI) Presiding officer of the Governing Body of the county containing the Development;

(VII) All elected members of the Governing Body of the county containing the Development;

(VIII) State senator of the district containing the Development; and

(IX) State representative of the district containing the Development.

(iii) Each such notice must include, at a minimum, all of the following:

(I) The Applicant's name, address, individual contact name and phone number;

(II) The Development name, address, city and county;

(III) A statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(IV) Statement of whether the Development proposes New Construction, reconstruction, Adaptive Reuse or Rehabilitation;

(V) The type of Development being proposed (single family homes, duplex, apartments, townhomes, high-rise etc.) and population being served (family, Intergenerational Housing or elderly);

(VI) The approximate total number of Units and approximate total number of low-income Units;

(VII) The approximate percentage of Units serving each level of AMGI (e.g. 20% at 50% of AMGI, etc.) and the approximate percentage of Units that are market rate;

(VIII) The number of Units and proposed rents (less utility allowances) for the low-income Units and the number of Units and the proposed rents for any market rate Units. Rents to be provided are those that are effective at the time of the Application, which are subject to change as annual changes in the area median income occur; and

(IX) The expected completion date if credits are awarded.

(B) Signage on Property or Alternative. A Public Notification Sign shall be installed on the Development Site prior to the date the Application is submitted unless prohibited by local ordinance or code or restrictive covenants. Scattered site Developments must install a sign on each non-contiguous Development Site. For Competitive Housing Tax Credit Applications the date, time and location of the public hearing, as published by the Department and closest to the Development Site, must be included on the sign. For Tax-Exempt Bond Developments, regardless of the Priority of the Application or the Issuer, the sign must be installed within thirty (30) days of the Department's receipt of Volumes I and II. The date, time and location of the bond Tax Exempt Fiscal Responsibility Act (TEFRA) public hearing must be included on the sign no later than thirty (30) days prior to the scheduled public hearing. Evidence submitted with the Application must include photographs of the site with the installed sign. The sign must be at least 4 feet by 8 feet in size and located within twenty (20) feet of, and facing, the main road adjacent to the site. The sign shall be continuously maintained on the site until the day that the Board takes final action on the Application for the Development. The information and lettering on the sign must meet the minimum requirements identified in the Application. For Tax-Exempt Bond Developments, regardless of the issuer, the Applicant must certify to the fact that the sign was installed within thirty (30) days of submission and the date, time and location of the TEFRA hearing is indicated on the sign at least thirty (30) days prior to the date of the scheduled hearing. In areas where the Public Notification Sign is prohibited by local ordinance or code or restrictive covenant, an alternative to installing a Public Notification Sign and at the same required time, the Applicant shall, mail written notification to those addresses described in either clause (i) or (ii) of this subparagraph. This written notification must include the information otherwise required for the sign as provided in the Application. The final Application must include a map of the proposed Development Site and mark the distance required by clause (i) or (ii) of this subparagraph, up to 1,000 feet, showing street names and addresses; a list of all addresses the notice was mailed to; an exact copy of the notice that was mailed; and a certification that the notice was mailed through the U.S. Postal Service and stating the date of mailing. If Public Notification Sign is prohibited by local ordinance or code or restrictive covenant, evidence of the applicable ordinance or code or restrictive covenant must be submitted in the Application.

(i) All addresses required for notification by local zoning notification requirements. For example, if the local zoning notification requirement is notification to all those addresses within 200 feet, then that would be the distance used for this purpose; or

(ii) For Developments located in communities that do not have zoning, communities that do not require a zoning notification or those located outside of a municipality, all addresses located within 1,000 feet of any part of the proposed Development Site.

(C) If any of the Units in the Development are occupied at the time of Application, then the Applicant must certify that it has notified each tenant at the Development of all the information otherwise required on the sign, including the Department's public hearing schedule for comment on submitted Applications.

(9) Evidence of the Development's proposed ownership structure and the Applicant's previous experience as described in subparagraphs (A) - (D) of this paragraph.

(A) Chart which clearly illustrates the complete organizational structure of the final proposed Development Owner and of any Developer or Guarantor, providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner or the Developer or Guarantor, as applicable, whether directly or through one or more subsidiaries. Nonprofit entities, public housing authorities, publicly traded corporations, individual board members, and executive directors must be included in this exhibit and trusts must list all beneficiaries or provide evidence that the structure of the trust does not allow the beneficiaries to access the funds of the trust.

(B) Each Applicant, Development Owner, Developer or Guarantor, or any entity shown on an organizational chart as described in subparagraph (A) of this paragraph that has ownership interest in the Development Owner, Developer or Guarantor, shall provide the following documentation, as applicable:

(i) For entities that are not yet formed but are to be formed either in or outside of the state of Texas, a certificate of reservation of the entity name from the Texas Secretary of State; or

(ii) For existing entities whether formed in or outside of the state of Texas, evidence that the entity has the authority to do business in Texas or has applied for such authority in the form of a Certificate of Filing from the Texas Secretary of State.

(C) Evidence that each entity shown on the organizational chart described in subparagraph (A) of this paragraph that has ownership interest in the Development Owner, Developer or Guarantor, has provided a copy of the completed and executed Previous Participation and Background Certification Form to the Department. Nonprofit entities, public housing authorities and publicly traded corporations are required to submit documentation for the entities involved; documentation for individual board members and executive directors is required for this exhibit. Any Person receiving more than 10% of the Developer fee will also be required to submit documents for this exhibit. The 2010 versions of these forms, as required in the Uniform Application, must be submitted. Units of local government are also required to submit this document. The form must include a list of all developments that are, or were, previously under ownership or Control of the Person. All participation in any TDHCA funded or monitored activity, including non-housing activities, must be disclosed.

(D) Evidence, in the form of a certification, that one of the Development Owner's General Partners, the Developer or their Principals has a record of successfully constructing or developing residential units in the capacity of owner, General Partner or Developer. Evidence must be a certification from the Department that the Person with the experience satisfies this exhibit, as further described under subsection (g)(1) of this section. Applicants must request this certification at least fourteen (14) days prior to the close of the Application Acceptance Period. Applicants must ensure that the Person whose name is

on the certification appears in the organizational chart provided in subparagraph (A) of this paragraph.

(10) Evidence of the Development's projected income and operating expenses as described in subparagraphs (A) - (D) of this paragraph:

(A) All Developments must provide a thirty (30) year proforma estimate of operating expenses and supporting documentation used to generate projections (operating statements from comparable properties);

(B) If rental assistance, an operating subsidy, an annuity, or an interest rate reduction payment is proposed to exist or continue for the Development, any related contract or other agreement securing those funds or proof of application for such funds must be provided, which at a minimum identifies the source and annual amount of the funds, the number of Units receiving the funds, and the term and expiration date of the contract or other agreement; (§2306.6705(4))

(C) Applicant must provide documentation from the source of the "Utility Allowance" estimate used in completing the Rent Schedule provided in the Application. This exhibit must clearly indicate which utility costs are included in the estimate;

(D) Occupied Developments undergoing Rehabilitation must also submit the items described in clauses (i) - (iv) of this subparagraph;

(i) The items in subclauses (I) and (II) of this clause are required unless the current property owner is unwilling to provide the required documentation. In that case, submit a signed statement as to the Applicant's inability to provide all documentation as described:

(I) Submit at least one of the following:

(-a-) Historical monthly operating statements of the subject Development for twelve (12) consecutive months ending not more than three (3) months from the first day of the Application Acceptance Period;

(-b-) The two most recent consecutive annual operating statement summaries;

(-c-) The most recent consecutive six (6) months of operating statements and the most recent available annual operating summary;

(-d-) All monthly or annual operating summaries available and a written statement from the seller refusing to supply any other summaries or expressing the inability to supply any other summaries, and any other supporting documentation used to generate projections may be provided; and

(II) A rent roll not more than six (6) months old as of the first day the Application Acceptance Period, that discloses the terms and rate of the lease, rental rates offered at the date of the rent roll, Unit mix, tenant names or vacancy, and dates of first occupancy and expiration of lease;

(ii) A written explanation of the process used to notify and consult with the tenants in preparing the Application; (§2306.6705(6))

(iii) For Intergenerational Housing Applications or Qualified Elderly Developments, identification of the number of existing tenants qualified under the target population elected under this title;

(iv) A relocation plan outlining relocation requirements and a budget with an identified funding source; and (§2306.6705(6))

(v) If applicable, evidence that the relocation plan has been submitted to the appropriate legal or governmental agency. (§2306.6705(6))

(11) Applications involving Nonprofit General Partners and Qualified Nonprofit Developments.

(A) All Applications involving a nonprofit General Partner, regardless of the Set-Aside applied under, in which the Development will receive some financial or tax benefit for the involvement of the nonprofit General Partner, must submit all of the documents described in clauses (i) and (ii) of this subparagraph and indicate the nonprofit status on the carryover documentation and IRS Forms 8609: (§2306.6706)

(i) An IRS determination letter which states that the nonprofit organization is a §501(c)(3) or (4) entity; and

(ii) The "Nonprofit Participation Exhibit."

(B) Additionally, all Applications applying under the Nonprofit Set-Aside, established under §50.7(b)(1) of this chapter, must also provide the following information with respect to the Qualified Nonprofit Organization as described in clauses (i) - (iii) of this subparagraph.

(i) A Third Party legal opinion stating:

(I) That the nonprofit organization is not affiliated with or Controlled by a for-profit organization and the basis for that opinion; and

(II) That the nonprofit organization is eligible, as further described, for a Housing Credit Allocation from the Nonprofit Set-Aside and the basis for that opinion. Eligibility is contingent upon the non-profit organization Controlling the Development, or if the organization's Application is filed on behalf of a limited partnership, or limited liability company, the Qualified Nonprofit Organization must be the controlling Managing Member; and otherwise meet the requirements of the Code, §42(h)(5); and

(III) That one of the exempt purposes of the nonprofit organization is to provide low-income housing; and

(IV) That the nonprofit organization prohibits a member of its board of directors, other than a chief staff member serving concurrently as a member of the board, from receiving material compensation for service on the board; and

(V) That the Qualified Nonprofit Development will have the nonprofit entity or its nonprofit Affiliate or subsidiary be the Developer or co-Developer as evidenced in the development agreement; and

(ii) A copy of the nonprofit organization's most recent audited financial statement; and

(iii) Evidence in the form of a certification that a majority of the members of the nonprofit organization's board of directors principally reside:

(I) In this state, if the Development is located in a Rural Area; or

(II) Not more than ninety (90) miles from the Development, if the Development is not located in a Rural Area.

(12) Applicants applying for acquisition credits must provide:

(A) An appraisal meeting the requirements of paragraph (14)(D) of this subsection; and

(B) An "Acquisition of Existing Buildings Form."

(13) Authorization to Release Credit Information. The authorization to release credit information must be unbound and clearly labeled. An Authorization to Release Credit Information" must be completed and signed for any General Partner, Developer or Guarantor and any Person that has an ownership interest of 10% or more in the Development Owner, General Partner, Developer, or Guarantor. Nonprofit entities, public housing authorities and publicly traded corporations are only required to submit documentation for the entities involved; documentation for individual board members and executive directors is not required for this exhibit.

(14) Supplemental Threshold Reports. All Applications must include documents under subparagraphs (A) and (B) of this paragraph. If required under paragraph (6) of this subsection, a Property Condition Assessment as described in subparagraph (C) of this paragraph must be submitted. If required under paragraph (7) or (12) of this subsection, an appraisal as described in subparagraph (D) of this paragraph must be submitted. All submissions must meet the requirements stated in subparagraphs (E) - (G) of this paragraph.

(A) A Phase I Environmental Site Assessment (ESA) report:

(i) Prepared by a qualified Third Party;

(ii) Dated not more than twelve (12) months prior to the first day of the Application Acceptance Period. In the event that a Phase I Environmental Site Assessment on the Development is more than twelve (12) months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated letter or updated report dated not more than three (3) months prior to the first day of the Application Acceptance Period from the Person or organization which prepared the initial assessment confirming that the site has been re-inspected and reaffirming the conclusions of the initial report or identifying the changes since the initial report;

(iii) Prepared in accordance with the Department's Environmental Site Assessment Rules and Guidelines, §1.35 of this title; and

(iv) Developments whose funds have been obligated by TRDO-USDA will not be required to supply this information; however, the Applicants of such Developments are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(B) A comprehensive Market Analysis report:

(i) Prepared by a Third Party Qualified Market Analyst approved by the Department in accordance with the approval process outlined in the Market Analysis Rules and Guidelines, §1.33 of this title;

(ii) Dated not more than six (6) months prior to the first day of the Application Acceptance Period. In the event that a Market Analysis is more than six (6) months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated Market Analysis from the Person or organization which prepared the initial report; however the Department will not accept any Market Analysis which is more than twelve (12) months old as of the first day of the Application Acceptance Period;

(iii) Prepared in accordance with the methodology prescribed in the Department's Market Analysis Rules and Guidelines, §1.33 of this title; and

(iv) For Applications in the TRDO-USDA Set-Aside proposing acquisition and Rehabilitation with residential structures at or above 80% occupancy at the time of Application Submission, the appraisal, required under paragraph (7) or (12) of this subsection and prepared in accordance with the Uniform Standards of Professional Appraisal Practice and the Department's Appraisal Rules and Guidelines, §1.34 of this title, will satisfy the requirement for a Market Analysis; however the Department may request additional information as needed. (§2306.67055, §42(m)(1)(A)(iii))

(C) A Property Condition Assessment (PCA) report (required for Rehabilitation, reconstruction and Adaptive Reuse Developments):

(i) Prepared by a qualified Third Party;

(ii) Dated not more than six (6) months prior to the first day of the Application Acceptance Period;

(iii) Prepared in accordance with the Department's Property Condition and Assessment Rules and Guidelines, §1.36 of this title; and

(iv) For Developments which require a capital needs assessment from TRDO-USDA, the capital needs assessment may be substituted and may be more than six (6) months old, as long as TRDO-USDA has confirmed in writing that the existing capital needs assessment is still acceptable and it meets the requirements of §1.36 of this title.

(D) An appraisal report:

(i) Prepared by a qualified Third Party;

(ii) Dated not more than six (6) months prior to the first day of the Application Acceptance Period. In the event that an appraisal is more than six (6) months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated appraisal from the Person or organization which prepared the initial report; however the Department will not accept any appraisal which is more than twelve (12) months old as of the first day of the Application Acceptance Period;

(iii) Prepared in accordance with the Uniform Standards of Professional Appraisal Practice and the Department's Appraisal Rules and Guidelines, §1.34 of this title; and

(iv) For Developments that require an appraisal from TRDO-USDA, the appraisal may be more than six (6) months old, as long as TRDO-USDA has confirmed in writing that the existing appraisal is still acceptable.

(E) Inserted at the front of each of these reports must be a transmittal letter from the individual preparing the report that states that the Department is granted full authority to rely on the findings and conclusions of the report. The transmittal letter must also state the report preparer has read and understood the Department rules specific to the report found at §§1.33 - 1.36 of this title.

(F) All Applicants acknowledge by virtue of filing an Application that the Department is not bound by any opinion expressed in the report. The Department may determine from time to time that information not required in the Department's Rules and Guidelines will be relevant to the Department's evaluation of the need for the Development and the allocation of the requested Housing Credit Allocation Amount. The Department may request additional information from the report provider or revisions to the report to meet this need. In instances of non-response by the report provider, the Department may substitute in-house analysis.

(G) The requirements for each of the reports identified in subparagraphs (A) - (C) of this paragraph can be satisfied in either of the methods identified in clause (i) or (ii) of this subparagraph and meet the requirements of clause (iii) of this subparagraph.

(i) Upon Application submission, the documentation for each of these exhibits may be submitted in its entirety; or

(ii) Upon Application submission, the Applicant may provide evidence in the form of an executed engagement letter with the party performing each of the individual reports that the required exhibit has been commissioned to be performed and that the delivery date will be no later than April 1, 2010. In addition to the submission of the engagement letter with the Application, a map must be provided that reflects the Qualified Market Analyst's intended market area. Subsequently, the entire exhibit must be submitted on or before 5:00 p.m. CDT, April 1, 2010. If the entire exhibit is not received by that time, the Application will be terminated and will be removed from consideration;

(iii) A single hard copy of the report and a searchable soft copy in the format of a single file containing all information and exhibits in the hard copy report, presented in the order they appear in the hard copy report on a CD-R clearly labeled with the report type, Development name, and Development location are required.

(15) Self-Scoring. Applicant's self-score must be completed on the "Application Self-Scoring Form." An Applicant may not adjust the Application Self Scoring Form, after the submission of the Application, without a request from the Department as a result of an Administrative Deficiency.

(i) Selection Criteria. All Applications will be scored and ranked using the point system identified in this subsection. Unless otherwise stated, do not round calculations. Points other than those provided in paragraphs (2) and (6) of this subsection will not be awarded unless requested in the Self Scoring Form. All Applications, with the exception of TRDO-USDA Applications, must receive a final score totaling a minimum of 118, not including any points awarded or deducted pursuant to paragraphs (2) and (6) of this subsection to be eligible for an allocation of Housing Tax Credits. Maximum Total Points: 240.

(1) Financial Feasibility of the Development. Financial Feasibility of the Development based on the supporting financial data required in the Application that will include a Development underwriting pro forma from the permanent or construction lender. (§2306.6710(b)(1)(A)) Applications may qualify to receive 28 points for this item. No partial points will be awarded. Evidence will include the documentation required for this exhibit, as reflected in the Application submitted, in addition to the commitment letter required under subsection (h)(7)(C) of this section. The supporting financial data shall include:

(A) A fifteen year pro forma prepared by the permanent or construction lender:

(i) Specifically identifying each of the first five (5) years and every fifth year thereafter;

(ii) Specifically identifying underlying assumptions including, but not limited to general growth factor applied to income and expense; and

(iii) Indicating that the Development maintains a minimum 1.15 debt coverage ratio throughout the initial fifteen (15) years proposed for all third party lenders that require scheduled repayment; and

(B) A statement in the commitment letter, or other form deemed acceptable by the Department, indicating that the lender's assessment finds that the Development will be feasible for fifteen (15) years.

(C) For Developments receiving financing from TRDO-USDA, the form entitled "Sources and Uses Comprehensive Evaluation for Multi-Family Housing Loans" or other form deemed acceptable by the Department shall meet the requirements of this section.

(2) Quantifiable Community Participation from Neighborhood Organizations on Record with the State or County and Whose Boundaries Contain the Proposed Development Site. Points will be awarded based on written statements of support or opposition from Neighborhood Organizations on record with the state or county in which the Development is to be located and whose boundaries contain the proposed Development site. (§2306.6710(b)(1)(B); §2306.6725(a)(2)) It is possible for points to be awarded or deducted based on written statements from organizations that were not identified by the process utilized for notification purposes under subsection (h)(8)(A)(ii) of this section if the organization provides the information and documentation required in subparagraphs (A) - (C) of this paragraph. It is also possible that neighborhood organizations that were initially identified as appropriate organizations for purposes of the notification requirements will subsequently be determined by the Department not to meet the requirements for scoring. If an organization is determined not to be qualified under this paragraph, the organization may qualify under paragraph (18)(B) of this subsection.

(A) Basic Submission Requirements for Scoring. Each Neighborhood Organization may submit one letter (and enclosures) that represents the organization's input. In order to receive a point score, the letter (and enclosures) must be received, by the Department, or postmarked, if mailed by the U.S. Postal Service, no later than March 1, 2010, for letters relating to Applications that submitted a Pre-Application, or April 1, 2010 if a Pre-Application was not submitted. Letters should be addressed to the Texas Department of Housing and Community Affairs, "Attention: Director of Multifamily Finance (Neighborhood Input)." Letters received after the applicable deadline will be summarized for the Board's information and consideration, but will not affect the score for the Application. The organization's letter (and enclosures) must:

(i) State the name and location of the proposed single Development;

(ii) Certify that the letter is signed by the persons with the authority to sign on behalf of the neighborhood organization, and provide:

(I) the street and/or mailing addresses;

(II) day and evening phone numbers;

(III) and e-mail addresses and/or facsimile numbers for the signers of the letter and one additional contact for the organization;

(IV) (if applicable) the minutes from the meeting at which the decision to support or oppose the development was made, identifying the section in the minutes where the decision was recorded;

(V) a list of the organization's membership that includes the name, address and email or telephone number for each member;

(iii) Certify that the organization has boundaries, and that the boundaries in effect March 1, 2010 contain the proposed Development Site;

(iv) Certify that the organization meets the definition of "Neighborhood Organization" as defined in §50.3(68) of this chapter. For the purposes of this section, a "Neighborhood Organization" is defined as an organization of persons living near one another within the organization's defined boundaries in effect March 1, 2010 that contain the proposed Development site and that has a primary purpose of working to maintain or improve the general welfare of the neighborhood. "Neighborhood Organizations" include homeowners associations, property owners associations, and resident councils in which the council is commenting on the Rehabilitation or reconstruction of the property occupied by the residents. "Neighborhood Organizations" do not include broader based "community" organizations;

(v) Include documentation showing that the organization is on record as of March 1, 2010 with the state or county in which the Development is proposed to be located. The receipt of a QCP letter, by the Department on or before March 1, 2010, that meets the requirements outlined in the QCP neighborhood information packet and the 2010 QAP, will constitute being on record with the State. The Neighborhood Organization letter must be signed by two officials or board members of the Neighborhood Organization and must include in its letter, a contact name with a mailing address and phone number of the persons signing the letter; one additional contact for the organization a written description and map of the organization's geographical boundaries; and proof that the boundaries described were in effect as of March 1, 2010. This request must be received no later than March 1, 2010. Acceptance of this documentation will be subject to Department approval. The Department is permitted to issue a deficiency notice for this registration process and if satisfied, the organization will still be deemed to be timely placed on record with the state;

(vi) Accurately certify that the Neighborhood Organization was not formed by any Applicant, Developer, or any seller of the land comprising the development site, any employee or agent of any Applicant in the 2010 Competitive Housing Tax Credit Application Round, that the organization and any member did not accept money or a gift to cause the Neighborhood Organization to take its position of support or opposition, and has not provided any assistance other than education and information sharing to the Neighborhood Organization to meet the requirements of this subparagraph for any Application in the Application Round (i.e. hosting a public meeting, providing the "TDHCA Information Packet for Neighborhoods" to the Neighborhood Organization, or referring the Neighborhood Organization to TDHCA staff for guidance). Applicants may not provide any "production" assistance to meet these requirements for any Application in the Application Round (i.e. use of fax machines owned by the Applicant, use of legal counsel related to the Applicant, or assistance drafting a letter for the purposes of this subparagraph). Any deficiency notices issued to the Neighborhood Organization will also be sent to the Applicant for information purposes only. Applicants may not provide delivery assistance of any communication between the Neighborhood Organization and the Department and Applicants may not assist the Neighborhood Organization in preparing its response to a deficiency notice. Applicants may provide information about the deficiency notice process or deadlines to a Neighborhood Organization;

(vii) Accurately certify that all residents within the Neighborhood Organization's defined boundaries were offered membership in the Neighborhood Organization;

(viii) While not required, the organization is encouraged to hold a meeting to which all the members of the organization are invited to consider whether the organization should support, oppose, or be neutral on the proposed Development, and to have the membership vote on whether the organization should support, oppose, or be neutral on the proposed Development. The organization is also encouraged to invite the Developer or Applicant to this meeting; and

(ix) Letters from Neighborhood Organizations, and subsequent correspondence from Neighborhood Organizations, may not be provided via the Applicant which includes facsimile and e-mail communication.

(B) Scoring of Letters (and Enclosures). The input must clearly and concisely state each reason for the Neighborhood Organization's support for or opposition to the proposed Development.

(i) The score awarded for each letter for this exhibit will range from a maximum of +24 points for the position support to +12 points for the neutral position to 0 for a position of opposition. The number of points to be allocated to each organization's letter will be based on the organization's letter and evidence enclosed with the letter. The final score will be determined by the Executive Director. The Department may investigate a matter and contact the Applicant and Neighborhood Organizations for more information. The Department may consider any relevant information specified in letters from other Neighborhood Organizations regarding a Development in determining a score.

(ii) The Department highly values quality public input addressed to the merits of a Development. Input that points out matters that are specific to the neighborhood, the proposed site, the proposed Development, or Developer are valued. If a proposed Development is permitted by the existing or pending zoning or absence of zoning, concerns addressed by the allowable land use that are related to any multifamily development may generally be considered to have been addressed at the local level through the land use planning process. Input concerning positive efforts or the lack of efforts by the Applicant to inform and communicate with the neighborhood about the proposed Development is highly valued. If the Neighborhood Organization refuses to communicate with the Applicant the efforts of the Applicant will not be considered negative. Input that evidences unlawful discrimination against classes of persons protected by Fair Housing law or the scoring of which the Department determines to be contrary to the Department's efforts to affirmatively further fair housing will not be considered.

(iii) In general, letters that meet the requirements of this paragraph and:

(I) Establish at least one reason for support or opposition will be scored the maximum points for either support (+24 points) or opposition (zero); or

(II) That do not establish a reason for support or opposition or that are unclear will be considered ineligible and scored as neutral (+12 points).

(iv) If an Application receives multiple eligible letters, the average score of all eligible letters will be applied to the Application.

(v) Applications for which no letters from Neighborhood Organizations are scored will receive a neutral score of +12 points.

(C) Basic Submission Deficiencies. The Department is authorized but not required to request that the Neighborhood Organization provide additional information or documentation the Department deems relevant to clarify information contained in the organization's letter (and enclosures). If the Department determines to request additional information from an organization, it will do so by e-mail or facsimile to the e-mail addresses or facsimile number provided with the organization's letter. If the deficiencies are not clarified or corrected

in the Department's determination within five (5) business days from the date the e-mail or facsimile is sent to the organization, the organization's letter will not be considered further for scoring and the organization will be so advised. This potential deficiency process does not extend any deadline required above for the "Quantifiable Community Participation" process. An organization may not submit additional information or documentation after the applicable deadlines except in response to an e-mail or facsimile from the Department specifically requesting additional information.

(3) The Income Levels of Tenants of the Development. Applications may qualify to receive up to 22 points for qualifying under only one of subparagraphs (A) - (F) of this paragraph. To qualify for these points, the household incomes must not be higher than permitted by the AMGI level (must round to the next highest whole Unit, no less than one Unit). If a Development includes market rate or non-restricted Units, to qualify for these points at least 10% of all the Units that are not Low-Income Units (i.e. market rate or non-restricted Units) in the Development must be set-aside with incomes at or below 80% of AMGI. The Development Owner, upon making selections for this exhibit, will set aside Units at the levels of AMGI and will maintain the percentage of such Units continuously over the compliance and extended use period as specified in the LURA. These income levels require corresponding rent levels that do not exceed 30% of the income limitation in accordance with §42(g), Internal Revenue Code. (§§2306.111(g)(3)(B); 2306.111(g)(3)(E); 2306.6710(b)(1)(C); 2306.6710(e); and 42(m)(1)(B)(ii)(I))

(A) 22 points if at least 80% of the Low-Income Units in the Development are set-aside with incomes at or below 50% of AMGI; or

(B) 22 points if at least 40% of the Low-Income Units in the Development are set-aside with incomes at or below a combination of 50% and 30% of AMGI in which at least 5% of the Low-Income Units are at or below 30% of AMGI; or

(C) 20 points if at least 60% of the Low-Income Units in the Development are set-aside with incomes at or below 50% of AMGI; or

(D) 18 points if at least 10% of the Low-Income Units in the Development are set-aside with incomes at or below 30% of AMGI; or

(E) 16 points if at least 40% of the Low-Income Units in the Development are set-aside with incomes at or below 50% of AMGI; or

(F) 14 points if at least 35% of the Low-Income Units in the Development are set-aside with incomes at or below 50% of AMGI.

(4) The Size and Quality of the Units (Development Characteristics). Applications may qualify to receive up to 20 points. Applications may qualify for points under both subparagraphs (A) and (B) of this paragraph. (§2306.6710(b)(1)(D) and §42(m)(1)(C)(iii))

(A) Size of the Units. Applications may qualify to receive 6 points. The Development must meet the minimum requirements identified in this subparagraph to qualify for points. Six points for this item will be automatically granted for Applications involving Rehabilitation (excluding Reconstruction), Developments receiving funding from TRDO-USDA, or Developments proposing Single Room Occupancy without meeting these square footage minimums if requested in the Self Scoring Form. The square feet of all of the Units in the Development, for each type of Unit, must be at least the minimum noted in clauses (i) - (v) of this subparagraph. Changes to an Application during any phase of the review process that decreases the square footage below the minimums noted in clauses (i) - (v) of this subparagraph, will be re-evaluated and may result in a reduction of the Application score.

(i) 600 square feet for an efficiency Unit;

(ii) 700 square feet for a one Bedroom Unit that is not in a Qualified Elderly Development nor an age restricted unit in an Intergenerational Development; 600 square feet for a one Bedroom Unit in a Qualified Elderly Development or an age restricted unit in an Intergenerational Development;

(iii) 950 square feet for a two Bedroom Unit that is not in a Qualified Elderly Development nor an age restricted unit in an Intergenerational Development; 750 square feet for a two Bedroom Unit in a Qualified Elderly Development or an age restricted unit in an Intergenerational Development;

(iv) 1,050 square feet for a three Bedroom Unit; and

(v) 1,250 square feet for a four Bedroom Unit.

(B) Quality of the Units. Applications may qualify to receive 14 points. Applications in which Developments provide specific amenity and quality features in every Unit at no extra charge to the tenant will be awarded points based on the point structure provided in clauses (i) - (xix) of this subparagraph, not to exceed 14 points in total. Applications involving scattered site Developments must have all of the Units located with a specific amenity to count for points. Applications involving Rehabilitation (excluding reconstruction) or Single Room Occupancy may receive 1.5 points for each point item, not to exceed 14 points in total (do not round).

(i) Covered entries (1 point);

(ii) Nine foot ceilings in living room and all bedrooms (at minimum) (1 point);

(iii) Microwave ovens (1 point);

(iv) Self-cleaning or continuous cleaning ovens (1 point);

(v) Ceiling fixtures in all rooms (light with ceiling fan in living area and all bedrooms) (1 point);

(vi) Refrigerator with icemaker (1 point);

(vii) Laundry connections (2 points);

(viii) Storage room or closet, of approximately 9 square feet or greater, which does not include bedroom, entryway or linen closets--does not need to be in the Unit but must be on the property site (1 point);

(ix) Laundry equipment (washers and dryers) for each individual unit including a front loading washer and dryer in required UFAS compliant Units (3 points);

(x) Thirty (30) year architectural shingle roofing (1 point);

(xi) Covered patios or covered balconies (1 point);

(xii) Covered parking (including garages) of at least one covered space per Unit (2 points);

(xiii) 100% masonry on exterior, which can include stucco, cementitious board products, concrete brick and mortarless concrete masonry, but not EIFS synthetic stucco (3 points) (Applicants may not select this item if clause (xiv) of this subparagraph is selected);

(xiv) Greater than 75% masonry on exterior, which can include stucco and cementitious board products, concrete brick and mortarless concrete masonry, but not EIFS synthetic stucco (1 point)

(Applicants may not select this item if clause (xiii) of this subparagraph is selected);

(xv) Use of energy efficient alternative construction materials (for example, Structural Insulated Panel construction) with wall insulation at a minimum of R-20 (3 points);

(xvi) R-15 Walls / R-30 Ceilings (rating of wall system) (3 points);

(xvii) 14 SEER HVAC or evaporative coolers in dry climates for New Construction, Adaptive Reuse, and reconstruction or radiant barrier in the attic for Rehabilitation (excluding reconstruction) (3 points);

(xviii) High Speed Internet service to all Units at no cost to residents (2 points); or

(xix) Fire sprinklers in all Units (2 points).

(5) The Commitment of Development Funding by Local Political Subdivisions. Applications may qualify to receive up to 18 points for qualifying under this paragraph provided for under Development Funding. (§2306.6710(b)(1)(E))

(A) Basic Submission Requirements for Scoring. Evidence of the following must be submitted in accordance with the Application Submission Procedures Manual (ASPM).

(i) The loans, grant(s) or in-kind contribution(s) must be attributed to the Total Housing Development Costs, as defined in this chapter, unless otherwise stipulated in this section.

(ii) An Applicant may submit enough sources to substantiate the point request, and all sources must be included in the Sources and Uses form. For example, if an Applicant is requesting 18 points, five sources may be submitted if each is for an amount equal to 1% of the Total Housing Development Cost.

(iii) An Applicant may substitute any source in response to a Deficiency Notice or after the Application has been submitted to the Department.

(iv) A loan does not qualify as an eligible source unless it has a minimum term of the later of 1-year or the Placed in Service date, and the interest rate must be at the Applicable Federal Rate (AFR) or below (at the time of loan closing).

(v) In-kind contributions such as donation of land, tax exemptions, or waivers of fees such as building permits, water and sewer tap fees, or similar contributions are only eligible for points if the in-kind contribution provides a tangible economic benefit that results in a quantifiable Total Housing Development Cost reduction to benefit the Development. The quantified value of the Total Housing Development Cost reduction may only include the value during the period the contribution or waiver is received and/or assessed. Donations of land must be under the control of the Applicant, pursuant to subsection (h)(7) of this section to qualify. The value of in-kind contributions may only include the time period between award, or August 2, 2010 and the Development's Placed in Service date, with the exception of contributions of land. The full value of land contributions, as established by the appraisal required pursuant to clause (viii) of this subparagraph will be counted. Contributions in the form of tax exemptions or abatements may only count for points if the contribution is in addition to any tax exemption or abatement required under statute.

(vi) To the extent that a Notice of Funding Availability (NOFA) is released and funds are available, funds from TDHCA's HOME Investment Partnerships (HOME) Program will qualify if a resolution, dated on or before the date the Application Acceptance Period ends, is submitted with the Application from the Governing Body of the Local Political Subdivision authorizing the Applicant to act on behalf of the Governing Body of the Local Political Subdivision in applying for HOME Funds from TDHCA for the particular Application. TDHCA's HOME funds may be substituted for a source originally submitted with the Application, provided the HOME funds substituted are from a NOFA released after the Application Acceptance Period ends and a resolution is submitted with the substitution documentation from the Governing Body of the Local Political Subdivision authorizing the Applicant to act on behalf of the Local Political Subdivision in applying for HOME Funds from TDHCA for the particular Application.

(vii) Development based rental subsidies may qualify under this section if evidence of the remaining value of the contract remaining as of December 31st of the application year is submitted from the Local Political Subdivision. The value of the contract does not include past subsidies.

(viii) Evidence to be submitted with the Application must include a copy of the commitment of funds; a copy of the application to the funding entity and a letter from the funding entity indicating that the application was received. For in-kind contributions, evidence must be submitted in the Application from Local Political Subdivision substantiating the value of the in-kind contributions. For in-kind contributions of land, evidence of the value of the contribution must be in the form of an appraisal.

(ix) If not already provided, at the time the executed Commitment Notice is required to be submitted, the Applicant or Development Owner must provide evidence of a commitment approved by the Governing Body of the Local Political Subdivision for the Development Funding to the Department. If the funding commitment from the Local Political Subdivision has not been received by the date the Department's Commitment Notice is to be submitted, the Application will be evaluated to determine if the loss of these points would have resulted in the Department's not committing the tax credits. If the loss of points would have made the Application noncompetitive, the Commitment Notice will be rescinded and the credits reallocated. If the Application would still be competitive even with the loss of points and the loss would not have impacted the recommendation for an award, the Application will be reevaluated for financial feasibility. If the Application is infeasible without the Local Political Subdivision's Development Funding, the Commitment Notice will be rescinded and the credits reallocated.

(x) Funding commitments from a Local Political Subdivision will not be considered final unless the Local Political Subdivision attests to the fact that any funds committed were not first provided to the Local Political Subdivision by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application, unless the Applicant itself is a Local Political Subdivision or subsidiary.

(B) Scoring. Points will be determined on a sliding scale based on the percentage of the Total Housing Development Costs of the Development, as reflected in the in the Development Cost Schedule. If a revised Development Cost Schedule is submitted to the Department in response to a deficiency notice at anytime during the review process, the Revised Development Cost Schedule will be utilized for this calculation, and Applicants will be notified of the revised score, consistent with subsection (e) of this section. Do not round for the following calculations. The "total contribution" is the total combined value of qualifying loan(s), grants or in-kind contributions from a Local Political Subdivision pursuant to subparagraph (A) of this paragraph.

(i) A total contribution equal to or greater than 1% (for Urban Developments) and 0.5% (for Rural Developments and

Developments located in non-participating jurisdictions) of the Total Housing Development Cost of the Development receives 6 points; or

(ii) A total contribution equal to or greater than 2.5% (for Urban Developments) and 1.5% (for Rural Developments and Developments located in non-participating jurisdictions) of the Total Housing Development Cost of the Development receives 12 points; or

(iii) A total contribution equal to or greater than 5% (for Urban Developments) and 3% (for Rural Developments and Developments located in non-participating jurisdictions) of the Total Housing Development Cost of the Development receives 18 points.

(6) The Level of Community Support from State Representative or State Senator. The level of community support for the Application, evaluated on the basis of written statements received from the State Representative or State Senator that represents the district containing the proposed Development Site. (§2306.6710(b)(1)(F) and §2306.6725(a)(2)) Applications may qualify to receive 14 points for this item. Letters must identify the specific Development and must clearly state support for or opposition to the specific Development. This documentation will be accepted with the Application or through delivery to the Department from the Applicant or the State Representative or Senator on or before 5:00 p.m. (CDT) April 1, 2010. A State Representative or State Senator may withdraw (in writing) a letter that is submitted by the April 1st deadline on or before June 15, 2010 but may not submit a new letter. The previous position of support or opposition that is withdrawn will be scored as neutral (0 points). State Representatives or Senators to be considered are those State Representatives or Senators in office at the time the Application is submitted. Letters of support from State Representatives or Senators that do not represent the district containing the proposed Development Site will not qualify for points under this Exhibit. Neutral letters, or letters that do not specifically refer to the Development, will receive neither positive nor negative points. Letters from State of Texas Representative or Senator: support letters are +14 points; opposition letters are -14 points for a maximum of either 14 or -14 points. If one letter is received in support and one letter is received in opposition the score would be 0 points.

(7) The Rent Levels of the Units. Applications may qualify to receive up to 12 points for qualifying under this exhibit. (§2306.6710(b)(1)(G)) Provided the Application has qualified for points under paragraph (3) of this subsection, Income Levels of Tenants of the Development, an Application may qualify for points under this subsection by providing additional Low-Income Units at 50% of AMGI (must round up to the next whole Unit, not less than one Unit), as follows:

(A) An Application may receive 12 points if the Development provides an additional 10% of all Low-Income Units in excess of those committed in paragraph (3) of this subsection at rents and incomes at or below 50% of AMGI; or

(B) An Application may receive 6 points if the Development provides an additional 5% of all Low-Income Units in excess of those committed in paragraph (3) of this subsection at rents and incomes at or below 50% of AMGI.

(8) The Cost of the Development by Square Foot (Development Characteristics). Applications may qualify to receive 10 points for this item. (§2306.6710(b)(1)(H); §42(m)(1)(C)(iii)) For this exhibit, costs shall be defined as construction costs, including site work, direct hard costs, contingency, contractor profit, overhead and general requirements, as represented in the Development Cost Schedule. This calculation does not include indirect construction costs. The calculation will be costs per square foot of Net Rentable Area (NRA). For the purposes of this paragraph only, if a building is in a Qualified Elderly Development or is an age restricted building in an Intergenerational Housing Development with an elevator or a high rise building with four or more stories serving any population, the NRA may include elevator served interior corridors. If the proposed Development is a Single Room Occupancy Development, the NRA may include elevator served interior corridors and may include up to 50 square feet of common area per Unit. As it relates to this paragraph, an interior corridor is a corridor that is enclosed, heated and/or cooled and otherwise finished space. The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule of the Application. Developments qualify for 10 points if their costs do not exceed $95 per square foot for Qualified Elderly, single family design, transitional, and Single Room Occupancy Developments (transitional housing for the homeless and Single Room Occupancy units as provided in the Code, §42(i)(3)(B)(iii) and (iv)), unless located in a "First Tier County" in which case their costs do not exceed $97 per square foot; and $85 for all other Developments, unless designated as "First Tier" by the Texas Department of Insurance, in which case their costs do not exceed $87 per square foot. For 2008, the First Tier counties are Aransas, Brazoria, Calhoun, Chambers, Galveston, Jefferson, Kenedy, Kleberg, Matagorda, Nueces, San Patricio, and Willacy. There are also specifically designated First Tier communities in Harris County that are east of State Highway 146, and evidence in the Application must include a map with the Development Site designated clearly within the community. These communities are Pasadena, Morgan's Point, Shoreacres, Seabrook and La Porte. Intergenerational Housing Developments will receive 10 points if costs described above do not exceed the square footage limit for elderly and non-elderly Units as determined by using the NRA attributable to the respective elderly and non-elderly Units. The Department will determine if points will be awarded by multiplying the NRA for elderly Units by the applicable square footage limit for the elderly Units and adding that total to the result of the multiplication of the NRA for family Units by the applicable non-elderly square footage limit. If this maximum cost amount is equal to, or greater than the total of the costs identified above for the Application, points will be awarded (10 points).

(9) The Services to be Provided to Tenants of the Development. Applications may qualify to receive up to 8 points. (§2306.6710(b)(1)(I) and §2306.6725(a)(1))

(A) The Applicant must certify that the Development will provide a combination of special supportive services appropriate for the proposed tenants. The provision of supportive services will be included in the LURA as selected from the list of services identified in this paragraph. No fees may be charged to the tenants for any of the services. Services must be provided on-site or transportation to off-site services must be provided (maximum of 7 points). The same service may not be used for more than one scoring item. Applications will be awarded points for selecting services listed in clauses (i) - (xvii) of this subparagraph:

(i) Joint use library center, as evidenced by a written agreement with the local school district (2 points);

(ii) child care (2 points);

(iii) transportation (1 point);

(iv) basic adult education (1 point);

(v) legal assistance (1 point);

(vi) counseling services (1 point);

(vii) GED preparation (1 point);

(viii) English as a second language classes (1 point);

(ix) vocational training (1 point);

(x) home buyer education (1 point);

(xi) credit counseling (1 point);

(xii) financial planning assistance or courses (1 point);

(xiii) health screening services (1 point);

(xiv) health and nutritional courses (1 point);

(xv) organized team sports programs or youth programs (1 point);

(xvi) scholastic tutoring (1 point); and

(xvii) any other programs described under Title IV-A of the Social Security Act (42 U.S.C. §§601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families approved in writing by the Department.

(B) In addition, Applications will receive 1 point for providing Notary Public Services to tenants at no cost to the tenant during regular business hours. If this point is selected, this requirement will be included in the LURA.

(10) Declared Disaster Areas. (§2306.6710(b)(1)) Applications may receive 7 points, if at time the complete Application is submitted or at any time within the two-year period preceding the date of submission, the proposed Development site is located in a Disaster Area as defined in §50.3(38) of this chapter.

(11) Rehabilitation, (which includes reconstruction) or Adaptive Reuse. Applications may qualify to receive 3 points. Applications proposing to build solely Rehabilitation (excluding New Construction of non-residential buildings), solely reconstruction (excluding New Construction of non-residential buildings), or solely Adaptive Reuse qualify for points.

(12) Housing Needs Characteristics. (§42(m)(1)(C)(ii)) Applications may qualify to receive up to 6 points (if the Development Site is located in an Area with a certain Affordable Housing Need Score). Each Application may receive a score if correctly requested in the self score form based on objective measures of housing need in the Area where the Development is located. This Affordable Housing Need Score for each Area will be published in a Site Demographic Characteristics table in the Reference Manual.

(13) Community Revitalization (Development Characteristics) (§42(m)(1)(C)(iii)) or Historic Preservation. Applications may qualify to receive 6 points for either subparagraph (A) or (B) of this paragraph.

(A) The Development includes the use of an Existing Residential Development and proposes any Rehabilitation or any Reconstruction that is part of a Community Revitalization Plan. Evidence of the Community Revitalization Plan (such evidence must include an ordinance, resolution, or otherwise recorded documentation of a vote taken by the local elected Governing Body specifically adopting the Community Revitalization Plan) and a letter from the chief executive officer or other local official with appropriate jurisdiction of the local Governing Body stating that the Development Site is located within the targeted development areas outlined in the Community Revitalization Plan must be submitted; or

(B) The Development includes the use of an existing building that is designated as historic by a federal or state Entity and proposes Rehabilitation (including reconstruction) or Adaptive Reuse. The Development itself must have the designation; points in this subparagraph are not available for Developments simply located within historic districts or areas that do not have a designation on the building. The Development must include the historic building. Evidence will include proof of the historic designation from the appropriate Governmental Entity.

(14) Pre-Application Participation Incentive Points. (§2306.6704) Applications that submitted a Pre-Application during the Pre-Application Acceptance Period and meet the requirements of this paragraph will qualify to receive 6 points for this item. To be eligible for these points, the Application must:

(A) Be for the identical Development Site, or reduced portion of the Development Site as the proposed Development Site under control in the Pre-Application;

(B) Have met the Pre-Application Threshold Criteria;

(C) Be serving the same target population (family, Intergenerational Housing, or elderly) as in the Pre-Application;

(D) Be applying for the same Set-Asides as indicated in the Pre-Application (Set-Asides can be dropped between Pre-Application and Application, but no Set-Asides can be added); and

(E) Be awarded by the Department an Application score that is not more than 5% greater or less than the number of points awarded by the Department at Pre-Application, with the exclusion of points for support and opposition under paragraphs (2), (6), and (18) of this subsection. The Application score used to determine whether the Application score is 5% greater or less than the number of points awarded at Pre-Application will also include all point losses under subsection (d)(4) of this section. An Applicant must choose, at the time of Application either clause (i) or (ii) of this subparagraph:

(i) To request the Pre-Application points and have the Department cap the Application score at no greater than the 5% increase regardless of the total points accumulated in the scoring evaluation. This allows an Applicant to avoid penalty for increasing the point structure outside the 5% range from Pre-Application to Application; or

(ii) To request that the Pre-Application points be forfeited and that the Department evaluate the Application as requested in the self-scoring sheet.

(15) Economic Development Initiatives. A Development that is located in one of the following two areas may qualify to receive 4 points. For the purpose of this paragraph, "area" shall mean the boundaries of any zone or community in subparagraph (A) of this paragraph or the area in which funds in subparagraph (B) of this paragraph must be used:

(A) A Designated State or Federal Empowerment/Enterprise Zone, Urban Enterprise Community, or Urban Enhanced Enterprise Community. To be eligible for these points, Applicants must submit a letter and a map of the zoned area from a city/county official stating that the proposed Development is located within such a designated zone or area; is eligible to receive the state or federal economic development grants or loans associated with such designations; and the city/county still has available funds in such program. The letter should be no older than six (6) months from the first day of the Application Acceptance Period. (General Appropriation Act, Article VII, Rider 3; §2306.127); or

(B) An area that has received an award within the three year period prior to November 1, 2009, from the Texas Capital Fund, Texas or Federal Enterprise Zone Fund, Texas Leverage Fund, Industrial Revenue Bond Program, Emerging Technologies, Skills Development, Rural Business Enterprise Grants, Certified Development Company Loans, or Micro Loan Program or other state or federally funded economic development initiatives approved by the Department (This excludes limited highway improvement and roadwork projects, but does include broader regional transportation initiatives targeted to expanding economic development). Grants that qualify in these areas are included in the Application Reference Manual;

(C) Points under subparagraphs (A) and (B) of this paragraph will not be granted if more than three (3) Developments received an award of Housing Tax Credits in the applicable area in the seven (7) years prior to the Application Acceptance Period. The Applicant must provide receipt of funds to the area by evidence of a map of the designated area for such funding and documentation of the recipient of the award of funds or a letter from the entity granting such funds stating that funds were awarded in the designated area.

(16) Development Location. (§2306.6725(a)(4); §42(m)(1)(C)(i)) Applications may qualify to receive 4 points. Evidence, not more than six (6) months old from the first day of the Application Acceptance Period, that the Development Site is located within one of the geographical areas described in subparagraphs (A) - (F) of this paragraph. Areas qualifying under any one of the subparagraphs (A) - (F) of this paragraph will receive 4 points. An Application may only receive points under one of the subparagraphs (A) - (F) of this paragraph.

(A) A geographical Area which is an Economically Distressed Area; a Colonia; or a Difficult Development Area (DDA) as specifically designated by the Secretary of HUD at the time of Application submission (these census tracts are designated in the 2010 Housing Tax Credit Site Demographic Characteristics included in the application materials). (§2306.127)

(B) The Development is located in a county that has received an award within the three (3) years prior to November 1, 2009, within the past three (3) years, from the Texas Department of Agriculture's Rural Municipal Finance Program or Real Estate Development and Infrastructure Program. Cities which have received one of these awards are categorized as awards to the county as a whole so Developments located in a different city than the city awarded, but in the same county, will still be eligible for these points.

(C) The Development is located in a census tract which has a median family income (MFI), as published by the United States Bureau of the Census (U.S. Census) that is higher than the median family income for the county in which the census tract is located. This comparison shall be made using the most recent data available as of the date the Application Round opens the year preceding the applicable program year. Developments eligible for these points must submit evidence documenting the median income for both the census tract and the county. These Census Tracts are outlined in the 2008 Housing Tax Credit Site Demographic Characteristics Report.

(D) The proposed Development will serve families with children (at least 70% of the Units must have an eligible bedroom mix of two bedrooms or more) and is proposed to be located in an elementary school attendance zone of an elementary school that has an academic rating of "Exemplary" or "Recognized," or comparable rating if the rating system changes. The date for consideration of the attendance zone is that in existence as of the opening date of the Application Round and the academic rating is the most current rating determined by the Texas Education Agency as of that same date. (§42(m)(1)(C)(vii))

(E) The proposed Development will expand affordable housing opportunities for low-income families with children outside of poverty areas. This must be demonstrated by showing that the Development will serve families with children (at least 70% of the Units must have an eligible bedroom mix of two bedrooms or more) and that the census tract in which the Development is proposed to be located has no greater than 10% poverty population according to the most recent census data. Intergenerational Developments may qualify for points if 70% of the non-elderly Units in the Development have an eligible bedroom mix of two bedrooms or more. (§42(m)(1)(C)(vii)) These Census Tracts are outlined in the 2010 Housing Tax Credit Site Demographic Characteristics Report.

(F) The proposed Development is located in an Urban Core, on a site where the proposed use is not prohibited by the Local Political Subdivision via ordinance or regulation.

(17) Green Building Initiatives. Application may qualify to receive up to 6 points for providing green building amenities (points under this paragraph may not be requested for the same items utilized for points under subsection (h)(4)(A)(ii)(XXV) of this section, Threshold Amenities) (Rehabilitation Developments will receive 1.5 points for each point requested for the green building amenities):

(A) passive solar heating/cooling (3 points maximum);

(i) Two points if the glazing area on the north- and south-facing walls of the building is at least 50% greater than the sum of the glazing area on the east- and west-facing walls; and the east-west axis of the building is within 15 degrees of due east-west;

(ii) One point if in addition to clause (i) of this subparagraph, utilize a narrow floor plate (less than 40 feet), and single loaded corridors to optimize daylight penetration and passive ventilation and solar screens or solar film on all East, West, and South Windows with building oriented to east-west axis within 15 degrees of due east-west, west-south axis within 15 degrees of due west-south, and south-east axis within 15 degrees of due south-east;

(B) water conserving features (2 points maximum, 1 point for each):

(i) Install high efficiency toilets using less than or equal to 1.28 gallons/flush or WaterSense certified;

(ii) Install bathroom lavatory faucets and showerheads that do not exceed 2.0 gallons/minute and kitchen faucets that do not exceed 1.5 gallons/minute. Applies to all fixtures throughout development. Rehab projects may choose to install compliant faucet aerators instead of replacing entire faucets;

(C) Provide Solar water heaters designed to provide at least 25% of the average energy used to heat domestic water throughout the entire development) (2 points);

(D) irrigation and landscaping (2 points);

(i) collected water (at least 50%) for irrigation purposes;

(ii) selection of native trees and plants that are appropriate to the site's soils and microclimate;

(E) sub-metered utility meters (2 points maximum);

(i) Sub-metered utility meters on rehab project without existing sub-meters or new construction senior project (2 points); or

(ii) Sub-metered utility meters on new construction project (excluding new construction senior project) (1 point);

(F) energy efficiency (4 points maximum);

(i) Three points if the development includes Energy-Star qualified windows and glass doors exclusively; and insulation, and air barriers greater than or equal to Energy Star air barrier and insulation criteria; and HVAC and domestic hot water heaters, or insulation that exceeds Energy Star standards; or

(ii) Four points if the project promotes energy efficiency by meeting the requirements of Energy Star for Homes by either complying with the appropriate builder option package or a HERS score of 85; or

(iii) Two points if thermally and draft efficient doors (SHGC of 0.40 or lower and U-value specified by climate zone according to the 2006 IECC) are used;

(G) photovoltaic panels for electricity and design and wiring for the use of such panels (3 points maximum);

(i) Photovoltaic panels that total 10 kW (1 point);

(ii) Photovoltaic panels that total 20 kW (2 points);

(iii) Photovoltaic panels that total 30 kW (3 points);

(H) construction waste management to divert a minimum of 50% of construction waste from landfills (1 point);

(I) implementation of EPA's Best Management Practices for erosion and sedimentation control during construction (1 point);

(J) recycling service provided throughout the compliance period (1 point);

(K) water permeable walkways (at least 20% of walkways and parking) (1 point);

(L) renewable materials, provide at least one of the following: bamboo flooring, wool carpet, linoleum flooring, straw board cabinetry, poplar OSB, or cotton batt insulation (1 point);

(M) healthy flooring, provide at least one of the following for 50% of flooring, finished concrete, ceramic tile resilient flooring material that is Floor Score Certified, applied with a Floor Score Certified adhesive and comes with a minimum 7-year wear through warranty (1 points);

(N) healthy finish materials, use paints, stains, adhesives and sealants consistent with the Green Seal 11 standard or other applicable Green Seal standards (1 point).

(18) Demonstration of Community Input other than Quantifiable Community Participation: if an Application was awarded 12 points under paragraph (2) of this subsection, then that Application may receive up to 6 points for letters that qualify for points under subparagraph (A), (B) or (C) of this paragraph. An Application may not receive points under more than one of the subparagraphs (A) - (C) of this paragraph. All letters must be received by March 1, 2010 for the Application to receive these points. At no time will the Application receive a score lower than zero for this item.

(A) An Application may receive two points (maximum of 6 points) for each letter of support submitted from a community or civic organization that serves the community in which the Development Site is located. Letters of support must identify the specific Development and must state support of the specific Development at the proposed location. The community or civic organization must provide some documentation of its existence in the community in which the Development is located to include, but not be limited to, listing of services and/or members, brochures, annual reports, etc. Letters of support from organizations that are not active in the area that includes the location of the Development will not be counted. For purposes of this subparagraph, community and civic organizations do not include neighborhood organizations, governmental entities (excluding Special Management Districts), taxing entities or educational activities. Organizations that were created by a governmental entity or derive their source of creation from a governmental entity do not qualify under this item. For purposes of this item, educational activities include school districts, trade and vocational schools, charter schools and depending on how characterized could include day care centers; it would not include a PTA or PTO as that is a service organization even though it supports an educational activity. Should an Applicant elect this option and the Application receives letters in opposition by March 1, 2010, then two points will be subtracted from the score for each letter in opposition, provided that the letter is from an organization serving the community.

(B) An Application may receive 6 points for a letter of support, from a property owners association created for a master planned community whose boundaries include the development site that does not meet the requirements of a Neighborhood Organization for points under paragraph (2) of this subsection.

(C) An Application may receive 6 points for a letter of support from a Special Management District, whose boundaries, as of March 1, 2010, include the Development Site and for which there is not a Neighborhood Organization on record with the county or state.

(19) Developments in Census Tracts with No Other Existing Same Type Developments Supported by Tax Credits. The Application may receive 6 points if the proposed Development is located in a census tract in which there are no other existing Developments supported by Housing Tax Credits that serve the same type of household, regardless of whether the development serves families, or elderly individuals (Intergenerational Housing is not a type of household as it relates to this paragraph). Applicant must provide evidence of the census tract in which the Development is located. (§2306.6725(b)(2)) These Census Tracts are outlined in the 2010 Housing Tax Credit Site Demographic Characteristics Report.

(20) Affirmative Marketing for Veterans. Applications may qualify to receive six points for this item. The Department will award these points to Applications that agree to include in their affirmative marketing plan for the development of a plan to affirmatively market to veterans. The Applicant will be required to report to the Department in the annual housing report on the results of the marketing efforts to veterans.

(21) Tenant Populations with Special Housing Needs. Applications may qualify to receive 4 points for this item. (§42(m)(1)(C)(v)) The Department will award these points to Applications in which at least 10% of the Units are set aside for Persons with Special Needs. Throughout the Compliance Period, unless otherwise permitted by the Department, the Development Owner agrees to affirmatively market Units to Persons with Special Needs. In addition, the Department will require a minimum twelve-month period during which Units must either be occupied by Persons with Special Needs or held vacant. The twelve (12) month period will begin on the date each building receives its certificate of occupancy. For buildings that do not receive a Certificate of Occupancy, the twelve-month period will begin on the placed in service date as provided in the Cost Certification manual. After the twelve-month period, the Development Owner will no longer be required to hold Units vacant for households with special needs, but will be required to continue to affirmatively market Units to household with special needs.

(22) Length of Affordability Period. Applications may qualify to receive up to 4 points. (§§2306.6725(a)(5); 2306.111(g)(3)(C); 2306.185(a)(1) and (c); 2306.6710(e)(2); and 42(m)(1)(B)(ii)(II)) In accordance with the Code, each Development is required to maintain its affordability for a 15-year compliance period and, subject to certain exceptions, an additional 15-year extended use period. Development Owners that are willing to extend the affordability period for a Development beyond the thirty (30) years required in the Code may receive points as follows:

(A) Add five (5) years of affordability after the extended use period for a total affordability period of thirty-five (35) years (2 points); or

(B) Add ten (10) years of affordability after the extended use period for a total affordability period of forty (40) years (4 points).

(23) Site Characteristics. Development Sites, including scattered sites, will be evaluated based on proximity to amenities, the presence of positive site features and the absence of negative site features. Sites will be rated based on the criteria in subparagraphs (A) and (B) of this paragraph.

(A) Proximity of site to amenities. Developments Sites located within a one mile radius (two-mile radius for Developments competing for a Rural Regional Allocation) of at least three services appropriate to the target population will receive four points. A site located within one-quarter mile of public transportation that is accessible to all residents including Persons With Disabilities and/or located within a community that has "on demand" transportation, special transit service, or specialized elderly transportation for Qualified Elderly Developments, will receive full points regardless of the proximity to amenities, as long as the Applicant provides appropriate evidence of the transportation services used to satisfy this requirement. If a Development is providing its own specialized van or on demand service, then this will be a requirement of the LURA. Only one service of each type listed in clauses (i) - (xiv) of this subparagraph will count towards the points. A map must be included identifying the Development Site and the location of the services. The services must be identified by name on the map. If the services are not identified by name, points will not be awarded. All services must exist or, if under construction, must be at least 50% complete by the date the Application is submitted (4 points).

(i) Full service grocery store or supermarket.

(ii) Pharmacy.

(iii) Convenience Store/Mini-market.

(iv) Department or Retail Merchandise Store.

(v) Bank/Credit Union.

(vi) Restaurant (including fast food).

(vii) Indoor public recreation facilities, such as civic centers, community centers, and libraries.

(viii) Outdoor public recreation facilities such as parks, golf courses, and swimming pools.

(ix) Hospital/medical clinic.

(x) Medical offices (physician, dentistry, optometry).

(xi) Public Schools (only eligible for Developments that are not Qualified Elderly Developments).

(xii) Senior Center.

(xiii) Dry cleaners.

(xiv) Family video rental (Blockbuster, Hollywood Video, Movie Gallery).

(B) Negative Site Features. Development Sites with the following negative characteristics will have points deducted from their score. For purpose of this exhibit, the term 'adjacent' is interpreted as sharing a boundary with the Development Site. The distances are to be measured from all boundaries of the Development Site to all boundaries of the property containing the negative site feature. If an Applicant negligently fails to note a negative feature, double points will be deducted from the score or the Application may be terminated. If none of these negative features exist, the Applicant must sign a certification to that effect (-6 points).

(i) Developments located adjacent to or within 300 feet of junkyards will have 1 point deducted from their score.

(ii) Developments located adjacent to or within 300 feet of active railroad tracks will have 1 point deducted from their score, unless the Applicant provides evidence that the city/community has adopted a Railroad Quiet Zone or the railroad in question is commuter or light rail. Rural Developments funded through TRDO-USDA are exempt from this point deduction.

(iii) Developments located adjacent to or within 300 feet of heavy industrial uses such as manufacturing plants will have 1 point deducted from their score.

(iv) Developments located adjacent to or within 300 feet of a solid waste or sanitary landfills will have 1 point deducted from their score.

(v) Developments where the buildings are located within the "fall line" of high voltage transmission power lines will have 1 point deducted from their score.

(vi) Developments where the buildings are located within the accident zones or clear zones for commercial or military airports will have 1 point deducted from their score.

(24) Development Size. The Development consists of not more than 36 Units (3 points).

(25) Qualified Census Tracts with Revitalization. Applications may qualify to receive 1 point for this item. (§42(m)(1)(B)(ii)(III)) Applications will receive the points for this item if the Development is located within a Qualified Census Tract and contributes to a concerted Community Revitalization Plan. Evidence of the Community Revitalization Plan (such evidence must include an ordinance, resolution, or otherwise recorded documentation of a vote taken by the local elected Governing Body specifically adopting the Community Revitalization Plan) and a letter from the chief executive officer or other local official with appropriate jurisdiction of the local Governing Body stating that the Development Site is located within the targeted development areas outlined in the Community Revitalization Plan must be submitted.

(26) Sponsor Characteristics. Applications may qualify to receive a maximum of 2 points for this item for qualifying under either subparagraph (A) or (B) of this paragraph. (§42(m)(1)(C)(iv))

(A) An Application will receive these two points for submitting a plan to use Historically Underutilized Businesses (HUB) in the development process consistent with the Historically Underutilized Business Guidelines for contracting with the State of Texas. The Applicant will be required to submit a report of the success of the plan as part of the cost certification documentation, in order to receive IRS Forms 8609.

(B) An Application will receive these points if there is evidence that a HUB that does not meet the experience requirements under subsection (g) of this section, as certified by the Texas Comptroller of Public Accounts, has at least 51% ownership interest in the General Partner and materially participates in the Development and operation of the Development throughout the Compliance Period. To qualify for these points, the Applicant must submit a certification from the Texas Comptroller of Public Accounts that the Person is a HUB at the close of the Application Acceptance Period. The HUB will be disqualified from receiving these points if any Principal of the HUB has developed, and received 8609's for, more than two Developments involving tax credits. Additionally, to qualify for these points, the HUB must partner with an experienced Developer (as defined by subsection (g) of this section); the experienced Developer, as an Affiliate, will not be subject to the credit limit described under §50.6(d) of this chapter for one Application per Application Round. For purposes of this section the experienced Developer may not be a Related Party to the HUB.

(27) Developments Intended for Eventual Tenant Ownership--Right of First Refusal. Applications may qualify to receive 1 point for this item. (§2306.6725(b)(1); §42(m)(1)(C)(viii)) Evidence that Development Owner agrees to provide a right of first refusal to purchase the Development upon or following the end of the Compliance Period for the minimum purchase price provided in, and in accordance with the requirements of, §42(i)(7) of the Code (the "Minimum Purchase Price"), to a Qualified Nonprofit Organization, the Department, or either an individual tenant with respect to a single family building, or a tenant cooperative, a resident management corporation in the Development or other association of tenants in the Development with respect to multifamily developments (together, in all such cases, including the tenants of a single family building, a "Tenant Organization"). Development Owner may qualify for these points by providing the right of first refusal in the following terms.

(A) Upon the earlier to occur of:

(i) The Development Owner's determination to sell the Development; or

(ii) The Development Owner's request to the Department, pursuant to §42(h)(6)(E)(II) of the Code, to find a buyer who will purchase the Development pursuant to a "qualified contract" within the meaning of §42(h)(6)(F) of the Code, the Development Owner shall provide a notice of intent to sell the Development ("Notice of Intent") to the Department and to such other parties as the Department may direct at that time. If the Development Owner determines that it will sell the Development at the end of the Compliance Period, the Notice of Intent shall be given no later than two (2) years prior to expiration of the Compliance Period. If the Development Owner determines that it will sell the Development at some point later than the end of the Compliance Period, the Notice of Intent shall be given no later than two (2) years prior to date upon which the Development Owner intends to sell the Development.

(B) During the two (2) years following the giving of Notice of Intent, the Sponsor may enter into an agreement to sell the Development only in accordance with a right of first refusal for sale at the Minimum Purchase Price with parties in the following order of priority:

(i) During the first six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization that is also a community housing development organization, as defined for purposes of the federal HOME Investment Partnerships Program at 24 C.F.R. §92.1 (a "CHDO") and is approved by the Department;

(ii) During the second six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization or a Tenant Organization; and

(iii) During the second year after the Notice of Intent, only with the Department or with a Qualified Nonprofit Organization approved by the Department or a Tenant Organization approved by the Department;

(iv) If, during such two-year period, the Development Owner shall receive an offer to purchase the Development at the Minimum Purchase Price from one of the organizations designated in clauses (i) - (iii) of this subparagraph (within the period(s) appropriate to such organization), the Development Owner shall sell the Development at the Minimum Purchase Price to such organization. If, during such period, the Development Owner shall receive more than one offer to purchase the Development at the Minimum Purchase Price from one or more of the organizations designated in clauses (i) - (iii) of this subparagraph (within the period(s) appropriate to such organizations), the Development Owner shall sell the Development at the Minimum Purchase Price to whichever of such organizations it shall choose.

(C) After whichever occurs the later of:

(i) The end of the Compliance Period; or

(ii) Two (2) years from delivery of a Notice of Intent, the Development Owner may sell the Development without regard to any right of first refusal established by the LURA if no offer to purchase the Development at or above the Minimum Purchase Price has been made by a Qualified Nonprofit Organization, a Tenant Organization or the Department, or a period of one hundred twenty (120) days has expired from the date of acceptance of all such offers as shall have been received without the sale having occurred, provided that the failure(s) to close within any such 120-day period shall not have been caused by the Development Owner or matters related to the title for the Development.

(D) At any time prior to the giving of the Notice of Intent, the Development Owner may enter into an agreement with one or more specific Qualified Nonprofit Organizations and/or Tenant Organizations to provide a right of first refusal to purchase the Development for the Minimum Purchase Price, but any such agreement shall only permit purchase of the Development by such organization in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(E) The Department shall, at the request of the Development Owner, identify in the LURA a Qualified Nonprofit Organization or Tenant Organization which shall hold a limited priority in exercising a right of first refusal to purchase the Development at the Minimum Purchase Price, in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(F) The Department shall have the right to enforce the Development Owner's obligation to sell the Development as herein contemplated by obtaining a power-of-attorney from the Development Owner to execute such a sale or by obtaining an order for specific performance of such obligation or by such other means or remedy as shall be, in the Department's discretion, appropriate.

(28) Leveraging of Private, State, and Federal Resources. Applications may qualify to receive 1 point for this item. (§2306.6725(a)(3)) Funding sources used for points under paragraph (5) of this subsection, may not be used for this point item.

(A) Evidence must be submitted in the Application that the proposed Development has received or will receive loan(s), grant(s) or in-kind contributions from a private, state or federal resource, which

include Capital Grant Funds and HOPE VI funds, that is equal to or greater than 2% (do not round) of the Total Housing Development Costs reflected in the Application.

(B) For in-kind contributions, evidence must be submitted in the Application from a private, state or federal resource which substantiates the value of the in-kind contributions. Development based rental subsidies from private, state or federal resource may qualify under this section if evidence of the remaining value of the contract is submitted from the source. The value of the contract does not include past subsidies.

(C) Qualifying funds awarded through local entities may qualify for points if the original source of the funds is from a private, state or federal source. If qualifying funds awarded through local entities are used for this item, a statement from the local entity must be provided that identifies the original source of funds.

(D) Applicants may only submit enough sources to substantiate the point request, and all sources must be included in the Sources and Uses form. For example, two sources may be submitted if each is for an amount equal to 1% of the Total Housing Development Cost. However, two sources may not be submitted if each source is for an amount equal to 2% of the Total Housing Development Cost.

(E) The funding must be in addition to the primary funding (construction and permanent loans) that is proposed to be utilized and cannot be issued from the same primary funding source or an affiliated source. The provider of the funds must attest to the fact that they are not the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application and attest that none of the funds committed were first provided to the entity by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application, unless the Applicant itself is a Local Political Subdivision.

(F) The Development must have already applied for funding from the funding entity. Evidence to be submitted with the Application must include a copy of the commitment of funds or a copy of the application to the funding entity and a letter from the funding entity indicating that the application was received. At the time the executed Commitment Notice is required to be submitted, the Applicant or Development Owner must provide evidence of a commitment approved by the governing body of the entity for the sufficient financing to the Department. If the funding commitment from the private, state or federal source, identified in the Application, or qualifying substitute source, has not been received by the date the Department's Commitment Notice is to be submitted, the Application will be evaluated to determine if the loss of these points would have resulted in the Department's not committing the tax credits. If the loss of points would have made the Application noncompetitive, the Commitment Notice will be rescinded and the credits reallocated. If the Application would still be competitive even with the loss of points and the loss would not have impacted the recommendation for an award, the Application will be reevaluated for financial feasibility. If the Application is infeasible without the commitment from the private, state or federal source, the Commitment Notice will be rescinded and the credits reallocated. Funds from the Department's HOME and Housing Trust Fund sources will only qualify under this category if there is a Notice of Funding Availability (NOFA) out for available funds and the Applicant is eligible under that NOFA.

(G) To qualify for this point, the Rent Schedule must show that at least 3% (not using normal rounding) of all Low-Income Units are designated to serve individuals or families with incomes at or below 30% of AMGI.

(29) Third-Party Funding Commitment Outside of Qualified Census Tracts. Applications may qualify to receive 1 point for this item. (§2306.6710(e)(1)) Evidence that the proposed Development has documented and committed Third-Party funding sources and the Development is located outside of a Qualified Census Tract. The provider of the funds must attest to the fact that they are not the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application and attest that none of the funds committed were first provided to the entity by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application. The commitment of funds (an application alone will not suffice) must already have been received from the Third-Party funding source and must be equal to or greater than 2% (do not round) of the Total Development Costs reflected in the Application. Funds from the Department's HOME and Housing Trust Fund sources will not qualify under this category. The Third-Party funding source cannot be a loan from a commercial lender.

(30) Scoring Criteria Imposing Penalties. (§2306.6710(b)(2))

(A) Penalties will be imposed on an Application if the Applicant has requested an extension of the Carryover or 10% Test deadline, and did not meet the original submission deadline, relating to Developments receiving a Housing Tax Credit commitment made in the Application Round preceding the current round. For each extension request made, the Applicant will receive a 5 point deduction. No penalty points or fees will be deducted for extensions that were requested on Developments that involved Rehabilitation when the Department is the primary lender, or for Developments that involve TRDO-USDA as a lender if TRDO-USDA or the Department is the cause for the Applicant not meeting the deadline.

(B) Penalties will be imposed on an Application if the Developer or Principal of the Applicant has been removed by the lender, equity provider, or limited partners in the past five (5) years for failure to perform its obligations under the loan documents or limited partnership agreement. An affidavit will be provided by the Applicant and the Developer certifying that they have not been removed as described, or requiring that they disclose each instance of removal with a detailed description of the situation. If an Applicant or Developer submits the affidavit, and the Department learns at a later date that a removal did take place as described, then the Application will be terminated and any Allocation made will be rescinded. The Applicant, Developers or Principals of the Applicant that are in court proceedings at the time of Application must disclose this information and the situation will be evaluated on a case-by-case basis. 3 points will be deducted for each instance of removal.

(C) Penalties will be imposed on an Application if Developer or Principal of the Applicant violates the Adherence to Obligations pursuant to subsection (c) of this section.

(31) Bonus Points. Applicants may received up to five (5) additional points for having limited deficiencies in the Application. The deficiencies will be determined at the reasonable discretion of the Department as defined in this chapter. The points will the awarded as follows:

(A) Two (2) or less deficiencies for Eligibility review (1 point);

(B) Five (5) or less deficiencies for Selection review (2 points); and/or

(C) Ten (10) or less deficiencies for Threshold review (3 points).

(j) Tie Breaker Factors.

(1) In the event that two or more Applications receive the same number of points in any given Set-Aside category, Rural Regional Allocation or Urban Regional Allocation, or Uniform State Service Region, and are both practicable and economically feasible, the Department will utilize the factors in this paragraph, in the order they are presented, to determine which Development will receive a preference in consideration for a tax credit commitment.

(A) Applications involving any Rehabilitation or Reconstruction of existing Units will win this first tier tie breaker over Applications involving solely New Construction or Adaptive Reuse.

(B) The Application located in the municipality or, if located outside a municipality, the county that has the lowest state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Round begins as reflected in the Reference Manual will win this second tier tie breaker.

(C) The amount of requested tax credits per square foot of Net Rentable Area (the lower credits per square foot has preference).

(D) Developments that are intended for eventual tenant ownership. Such Developments must utilize a detached single family site plan and building design and have a business plan describing how the Development is intended to convert to tenant ownership at the end of the 15-year compliance period.

(2) This paragraph identifies how ties will be handled when dealing with the restrictions on location identified in §50.5(a)(8) of this chapter, and in dealing with any issues relating to capture rate calculation. When two Tax-Exempt Bond Developments would violate one of these restrictions, and only one Development can be selected, the Department will utilize the reservation docket number issued by the Texas Bond Review Board in making its determination. When two Competitive Housing Tax Credits Applications in the Application Round would violate one of these restrictions, and only one Development can be selected, the Department will utilize the tie breakers identified in paragraph (1) of this subsection. When a Tax-Exempt Bond Development and a Competitive Housing Tax Credit Application in the Application Round would both violate a restriction, the following determination will be used:

(A) Tax-Exempt Bond Developments that receive their reservation from the Bond Review Board on or before April 30, 2010 will take precedence over the Housing Tax Credit Applications in the 2010 Application Round;

(B) Housing Tax Credit Applications approved by the Board for tax credits in July 2010 will take precedence over the Tax-Exempt Bond Developments that received their reservation from the Bond Review Board on or between May 3, 2010 and July 31, 2010; and

(C) After July 31, 2010, a Tax-Exempt Bond Development with a reservation from the Bond Review Board will take precedence over any Housing Tax Credit Application from the 2010 Application Round on the Waiting List. However, if no reservation has been issued by the date the Board approves an allocation to a Development from the Waiting List of Applications in the 2010 Application Round or a forward commitment, then the Waiting List Application or forward commitment will be eligible for its allocation.

(k) Staff Recommendations. (§2306.1112 and §2306.6731) After eligible Applications have been evaluated, ranked and underwritten in accordance with the QAP and the Rules, the Department staff shall make its recommendations to the Executive Award and Review Advisory Committee. The Committee will develop funding priorities and shall make commitment recommendations to the Board. Such recommendations and supporting documentation shall be made in advance of the meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed. The Committee will provide written, documented recommendations to the Board which will address at a minimum the financial or programmatic viability of each Application and a list of all submitted Applications which enumerates the reason(s) for the Development's proposed selection or denial, including all factors provided in §50.10(a) of this chapter that were used in making this determination.

(l) Tax Credits Financed Under American Recovery and Reinvestment Act of 2009. (§2306.6736)

(1) To the extent the Department receives federal funds under the American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5) or any subsequent law (including any extension or renewal thereof) that requires the Department to award the federal funds in the same manner and subject to the same limitation as the awards of the housing tax credits, the following provisions apply.

(2) Any reference in this chapter to the administration of the housing tax credit program shall apply equally to the administration of such federal funds except:

(A) the Department may establish a separate application procedure for such funds, outside of the uniform application cycle referred to in §2306.111, Texas Government Code, and the deadlines established in §2306.6724, Texas Government Code, and any reference herein to the application period shall refer to the period beginning on the date the Department begins accepting applications for such funds and continuing until all such available funds are awarded; and

(B) unless reauthorized, this section is repealed on August 31, 2011.

§50.10. Board Decisions; Waiting List; Forward Commitments.

(a) Board Decisions. The Board's decisions shall be based upon the Department's and the Board's evaluation of the proposed Developments' consistency with the criteria and requirements set forth in this QAP and Rules.

(1) On awarding tax credits, the Board shall document the reasons for each Application's selection, including any discretionary factors used in making its determination, and the reasons for any decision that conflicts with the recommendations made by Department staff. The Board may not make, without good cause, a commitment decision that conflicts with the recommendations of Department staff. Good cause includes the Board's decision to apply discretionary factors. (§§2306.6725(c); 2306.6731; and 42(m)(1)(A)(iv))

(2) In making a determination to allocate tax credits, the Board shall be authorized to not rely solely on the number of points scored by an Application. It shall in addition, be entitled to take into account, as it deems appropriate, the discretionary factors listed in this paragraph. The Board may also apply these discretionary factors to its consideration of Tax-Exempt Bond Developments. If the Board disapproves or fails to act upon an Application, the Department shall issue to the Applicant a written notice stating the reason(s) for the Board's disapproval or failure to act. In making tax credit decisions (including those related to Tax-Exempt Bond Developments), the Board, in its discretion, may evaluate, consider and apply any one or more of the following discretionary factors: (§2306.111(g)(3))

(A) The Developer market study;

(B) The location;

(C) The compliance history of the Developer;

(D) The financial feasibility;

(E) The appropriateness of the Development's size and configuration in relation to the housing needs of the community in which the Development is located;

(F) The Development's proximity to other low-income housing Developments;

(G) The availability of adequate public facilities and services;

(H) The anticipated impact on local school districts;

(I) Zoning and other land use considerations;

(J) Any matter considered by the Board to be relevant to the approval decision and in furtherance of the Department's purposes; and

(K) Other good cause as determined by the Board.

(3) Before the Board approves any Application, the Department shall assess the compliance history of the Applicant with respect to all applicable requirements; and the compliance issues associated with the proposed Development, including compliance information provided by the Texas State Affordable Housing Corporation. The Committee shall provide to the Board a written report regarding the results of the assessments. The written report will be included in the appropriate Development file for Board and Department review. The Board shall fully document and disclose any instances in which the Board approves a Development Application despite any noncompliance associated with the Development or Applicant. (§2306.057)

(b) Waiting List. (§2306.6711(c) and (d)) If the entire State Housing Credit Ceiling for the applicable calendar year has been committed or allocated in accordance with this chapter, the Board shall generate, concurrently with the issuance of commitments, a waiting list of additional Applications ranked by score in descending order of priority based on Set-Aside categories and regional allocation goals. The Board may also apply discretionary factors in determining the Waiting List. If at any time prior to the end of the Application Round, one or more Commitment Notices expire or a sufficient amount of the State Housing Credit Ceiling becomes available, the Board shall issue a Commitment Notice to Applications on the waiting list subject to the amount of returned credits, the regional allocation goals and the Set-Aside categories, including the 10% Nonprofit Set-Aside allocation and 15% At-Risk Set-Aside allocation and 5% TRDO-USDA Set-Aside required under the Code, §42(h)(5). At the end of each calendar year, all Applications which have not received a Commitment Notice shall be deemed terminated. The Applicant may re-apply to the Department during the next Application Acceptance Period.

(c) Forward Commitments. The Board may determine to issue commitments of tax credit authority with respect to Applications from the State Housing Credit Ceiling for the calendar year following the year of issuance (each a "forward commitment") to Applications submitted in accordance with the rules and timelines required under this rule and the Application Submission Procedures Manual. The Board will utilize its discretion in determining the amount of credits to be allocated as forward commitments and the reasons for those commitments considering score and discretionary factors. The Board may utilize the forward commitment authority to allocate credits to TRDO-USDA Developments which are experiencing foreclosure or loan acceleration at any time during the 2010 calendar year, also referred to as Rural Rescue Developments. Applications that are submitted under the 2010 QAP and granted a Forward Commitment of 2010 Housing Tax Credits are considered by the Board to comply with the 2010 QAP by having satisfied the requirements of this 2010 QAP, except for statutorily required QAP changes.

(1) Unless otherwise provided in the Commitment Notice with respect to a Development selected to receive a forward commitment, actions which are required to be performed under this chapter by a particular date within a calendar year shall be performed by such date in the calendar year of the State Housing Credit Ceiling from which the credits are allocated.

(2) Any forward commitment made pursuant to this section shall be made subject to the availability of State Housing Credit Ceiling in the calendar year with respect to which the forward commitment is made. If a forward commitment shall be made with respect to a Development placed in service in the year of such commitment, the forward commitment shall be a "binding commitment" to allocate the applicable credit dollar amount within the meaning of the Code, §42(h)(1)(C).

(3) If tax credit authority shall become available to the Department in a calendar year in which forward commitments have been awarded, the Department may allocate such tax credit authority to any eligible Development which received a forward commitment, in which event the forward commitment shall be canceled with respect to such Development.

§50.11. Required Application Notifications, Receipt of Public Comment, and Meetings with Applicants; Viewing of Pre-Applications and Applications; Confidential Information.

(a) Required Application Notifications, Receipt of Public Comment, and Meetings with Applicants.

(1) Within approximately fourteen (14) days after the close of the Pre-Application Acceptance Period, the Department shall publish a Pre-Application Submission Log on its website. Such log shall contain the Development name, address, Set-Aside, number of Units, requested credits, owner contact name and phone number. (§2306.6717(a)(1))

(2) Approximately thirty (30) days before the close of the Application Acceptance Period, the Department will release the evaluation and assessment of the Pre-Applications on its website.

(3) Not later than fourteen (14) days after the close of the Pre-Application Acceptance Period, or Application Acceptance Period for Applications for which no Pre-Application was submitted, the Department shall: (§2306.1114)

(A) Publish an Application submission log on its website.

(B) Give notice of a proposed Development in writing that provides the information required under clause (i) of this subparagraph to all of the individuals and entities described in clauses (ii) - (x) of this subparagraph. (§2306.6718(a) - (c))

(i) The following information will be provided in these notifications:

(I) The relevant dates affecting the Application including the date on which the Application was filed, the date or dates on which any hearings on the Application will be held and the date by which a decision on the Application will be made;

(II) A summary of relevant facts associated with the Development;

(III) A summary of any public benefits provided as a result of the Development, including rent subsidies and tenant services; and

(IV) The name and contact information of the employee of the Department designated by the director to act as the information officer and liaison with the public regarding the Application.

(ii) Presiding officer of the Governing Body of the political subdivision containing the Development (mayor or county judge) to advise such individual that the Development, or a part thereof, will be located in his/her jurisdiction and request any comments which such individual may have concerning such Development;

(iii) If the Department receives a letter from the mayor or county judge of an affected city or county that expresses opposition to the Development, the Department will give consideration to the objections raised and will offer to visit the proposed site or Development with the mayor or county judge or their designated representative within thirty (30) days of notification. The site visit must occur before the Housing Tax Credit can be approved by the Board. The Department will obtain reimbursement from the Applicant for the necessary travel and expenses at rates consistent with the state authorized rate; (General Appropriation Act, Article VII, Rider 5) (§42(m)(1))

(iv) Any member of the Governing Body of a political subdivision who represents the Area containing the Development. If the Governing Body has single-member districts, then only that member of the Governing Body for that district will be notified, however if the Governing Body has at-large districts, then all members of the Governing Body will be notified;

(v) State representative and state senator who represent the community where the Development is proposed to be located. If the state representative or senator host a community meeting, the Department, if timely notified, will ensure staff are in attendance to provide information regarding the Housing Tax Credit Program; (General Appropriation Act, Article VII, Rider 8(d))

(vi) United States representative who represents the community containing the Development;

(vii) Superintendent of the school district containing the Development;

(viii) Presiding officer of the board of trustees of the school district containing the Development;

(ix) Any Neighborhood Organizations on record with the state or county in which the Development is to be located and whose boundaries contain the proposed Development site or otherwise known to the Applicant or Department and on record with the state or county; and

(x) Advocacy organizations, social service agencies, civil rights organizations, tenant organizations, or others who may have an interest in securing the development of affordable housing that are registered on the Department's e-mail list service.

(C) The Department shall maintain an electronic mail notification service that will notify a subscriber, by zip code, of: (§2306.67171)

(i) The receipt of a Pre-Application or Application for a Development Site within such zip code within fourteen (14) days of receipt;

(ii) The publication of materials to be presented to the Board for the Pre-Application or Application referred to in clause (i) of this subparagraph; and

(iii) Any public hearing for the Pre-Application or Application referred to in clause (i) of this subparagraph.

(D) The elected officials identified in subparagraph (B) of this paragraph will be provided an opportunity to comment on the Application during the Application evaluation process. (§42(m)(1))

(4) The Department shall hold at least three public hearings in different Uniform State Service Regions of the state to receive comment on the submitted Applications and on other issues relating to the Housing Tax Credit Program for Competitive Housing Tax Credit Applications under the State Housing Credit Ceiling. (§2306.6717(c))

(5) The Department shall make available on the Department's website information regarding the Housing Tax Credit Program including notice of public hearings, meetings, Application Round opening and closing dates, submitted Applications, and Applications approved for underwriting and recommended to the Board, and shall provide that information to locally affected community groups, local and state elected officials, local housing departments, any appropriate newspapers of general or limited circulation that serve the community in which a proposed Development is to be located, nonprofit and for-profit organizations, on-site property managers of occupied Developments that are the subject of Applications for posting in prominent locations at those Developments, and any other interested persons including community groups, who request the information. (§2306.6717(b))

(6) Approximately forty (40) days prior to the date of the July Board meeting at which the issuance of Commitment Notices shall be discussed, the Department will notify each Applicant of the receipt of any opposition received by the Department relating to his or her Development at that time.

(7) Not later than the third working day after the date of completion of each stage of the Application process, including the results of the Application scoring and underwriting phases and the commitment phase, the results will be posted to the Department's website. (§2306.6717(a)(3))

(8) At least thirty (30) days prior to the date of the July Board meeting at which the issuance of Commitment Notices shall be discussed, the Department will:

(A) Provide the Application scores to the Board; and (§2306.6711(a))

(B) If feasible, post to the Department's website the entire Application, including all supporting documents and exhibits, the Application Log as further described in §50.19(b) of this chapter, a scoring sheet providing details of the Application score, and any other documents relating to the processing of the Application. (§2306.6717(a)(1) and (2))

(9) A summary of comments received by the Department on specific Applications shall be part of the documents required to be reviewed by the Board under this subsection if such comments are received thirty (30) business days prior to the date of the Board Meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed. Comments received after this deadline will not be part of the documentation submitted to the Board. However, a public comment period will be available prior to the Board's decision, at the Board meeting where tax credit commitment decisions will be made.

(10) Not later than the 120th day after the date of the initial issuance of Commitment Notices for Housing Tax Credits, the Department shall provide an Applicant who did not receive a commitment for Housing Tax Credits with an opportunity to meet and discuss with the Department the Application's deficiencies, scoring and underwriting. (§2306.6711(e))

(b) Viewing of Pre-Applications and Applications. Pre-Applications and Applications for tax credits are public information and are available upon request after the Pre-Application and Application Acceptance Periods close, respectively. All Pre-Applications and Appli-

cations, including all exhibits and other supporting materials, except Personal Financial Statements and Social Security numbers, will be made available for public disclosure after the Pre-Application and Application periods close, respectively. The content of Personal Financial Statements may still be made available for public disclosure upon request if the Attorney General's office deems it is not protected from disclosure by the Texas Public Information Act.

(c) Confidential Information. The Department may treat the financial statements of any Applicant as confidential and may elect not to disclose those statements to the public. A request for such information shall be processed in accordance with §552.305 of the Texas Government Code. (§2306.6717(d))

§50.12. Tax-Exempt Bond Developments: Filing of Applications; Applicability of Rules; Supportive Services; Financial Feasibility Evaluation; Satisfaction of Requirements.

(a) Filing of Applications for Tax-Exempt Bond Developments. Applications for a Tax-Exempt Bond Development may be submitted to the Department as described in paragraphs (1) and (2) of this subsection:

(1) Applicants which receive advance notice of a Program Year 2010 reservation as a result of the Texas Bond Review Board's (TBRB) lottery for the private activity volume cap must file a complete Application not later than 12:00 p.m. on December 30, 2009. Such filing must be accompanied by the Application fee described in §50.20 of this chapter;

(2) Applicants which receive advance notice of a Program Year 2010 reservation after being placed on the waiting list as a result of the TBRB lottery for private activity volume cap must submit Volume 1 and Volume 2 of the Application and the Application fee described in §50.20 of this chapter prior to the Applicant's bond reservation date as assigned by the TBRB. Those Applications designated as Priority 3 by the TBRB must submit Volumes I and II within fourteen (14) days of the bond reservation date if the Applicant intends to apply for tax credits regardless of the Issuer. Any outstanding documentation required under this section regardless of Priority must be submitted to the Department at least sixty (60) days prior to the Board meeting at which the decision to issue a Determination Notice would be made unless a waiver is requested by the Applicant. The Department staff will have limited discretion to recommend an Application with appropriate justification of the late submission;

(3) Applications involving multiple sites must submit the required information as outlined in the Application Submission Procedures Manual. The Application will be considered to be one Application as identified in Chapter 1372, Texas Government Code.

(b) Applicability of Rules for Tax-Exempt Bond Developments. Tax-Exempt Bond Development Applications are subject to all rules in this chapter, with the only exceptions being the following sections: §50.4 of this chapter (regarding State Housing Credit Ceiling), §50.7 of this chapter (regarding Regional Allocation and Set-Asides), §50.8 of this chapter (regarding Pre-Application), §50.9(d) and (f) of this chapter (regarding Evaluation Processes for Competitive Applications and Rural Rescue Applications), §50.9(i) of this chapter (regarding Selection Criteria), §50.10(b) and (c) of this chapter (regarding Waiting List and Forward Commitments), and §50.14(a) and (b) of this chapter (regarding Carryover and 10% Test). Such Developments requesting a Determination Notice in the current calendar year must meet all Threshold Criteria requirements stipulated in §50.9(h) of this chapter. Such Developments which received a Determination Notice in a prior calendar year must meet all Threshold Criteria requirements stipulated in the QAP and Rules in effect for the calendar year in which the Determination Notice was issued; provided, however, that such Developments shall comply with all procedural requirements for obtaining Department action in the current QAP and Rules; and such other requirements of the QAP and Rules as the Department determines applicable. Applicants will be required to meet all conditions of the Determination Notice by the time the construction loan is closed unless otherwise specified in the Determination Notice. Applicants must meet the requirements identified in §50.15 of this chapter. No later than sixty (60) days following closing of the bonds, the Development Owner must also submit a Management Plan and an Affirmative Marketing Plan (as further described in the Carryover Allocation Procedures Manual), and evidence must be provided at this time of attendance of the Development Owner or management company at Department-approved Fair Housing training relating to leasing and management issues for at least five (5) hours and the Development architect and engineer at Department-approved Fair Housing training relating to design issues for at least five (5) hours. Certifications must not be older than two (2) years. Applications that receive a reservation from the TBRB on or before December 31, 2008 will be required to satisfy the requirements of the 2008 QAP; Applications that receive a reservation from the TBRB on or after January 1, 2010 will be required to satisfy the requirements of the 2010 QAP.

(c) Supportive Services for Tax-Exempt Bond Developments. Tax-Exempt Bond Development Applications must provide an executed agreement with a qualified service provider for the provision of special supportive services that would otherwise not be available for the tenants. No fees may be charged to the tenants for any of the services. Services must be provided on-site or transportation to off-site services must be provided. The provision of these services will be included in the LURA. Acceptable services as described in paragraphs (1) - (3) of this subsection include:

(1) The services must be in at least one of the following categories: child care, transportation, notary public service, basic adult education, legal assistance, counseling services, GED preparation, English as a second language classes, vocational training, home buyer education, credit counseling, financial planning assistance or courses, health screening services, health and nutritional courses, organized team sports programs, youth programs, scholastic tutoring, social events and activities, community gardens or computer facilities;

(2) Any other program described under Title IV-A of the Social Security Act (42 U.S.C. §§601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families; or

(3) Any other services approved in writing by the Issuer. The plan for tenant supportive services submitted for review and approval of the Issuer must contain a plan for coordination of services with state workforce development and welfare programs. The coordinated effort will vary depending upon the needs of the tenant profile at any given time as outlined in the plan.

(d) Financial Feasibility Evaluation for Tax-Exempt Bond Developments. Code §42(m)(2)(D) requires the bond issuer (if other than the Department) to ensure that a Tax-Exempt Bond Development does not receive more tax credits than the amount needed for the financial feasibility and viability of a Development throughout the Compliance Period. Treasury Regulations prescribe the occasions upon which this determination must be made. In light of the requirement, issuers may either elect to underwrite the Development for this purpose in accordance with the QAP and the Underwriting Rules and Guidelines, §1.32 of this title or request that the Department perform the function. If

the issuer underwrites the Development, the Department will, nonetheless, review the underwriting report and may make such changes in the amount of credits which the Development may be allowed as are appropriate under the Department's guidelines. The Determination Notice issued by the Department and any subsequent IRS Form(s) 8609 will reflect the amount of tax credits for which the Development is determined to be eligible in accordance with this subsection, and the amount of tax credits reflected in the IRS Form 8609 may be greater or less than the amount set forth in the Determination Notice, based upon the Department's and the bond issuer's determination as of each building's placement in service. Any increase of tax credits, from the amount specified in the Determination Notice, at the time of each building's placement in service will only be permitted if it is determined by the Department, as required by Code §42(m)(2)(D), that the Tax-Exempt Bond Development does not receive more tax credits than the amount needed for the financial feasibility and viability of a Development throughout the Compliance Period. Increases to the amount of tax credits that exceed 110% of the amount of credits reflected in the Determination Notice are contingent upon approval by the Board. Increases to the amount of tax credits that do not exceed 110% of the amount of credits reflected in the Determination Notice may be approved administratively by the Executive Director.

(e) Satisfaction of Requirements for Tax-Exempt Bond Developments. If the Department staff determines that all requirements of this QAP and Rules have been met, the Department will recommend that the Board authorize the issuance of a Determination Notice. The Board, however, may utilize the discretionary factors identified in §50.10(a) of this chapter in determining if they will authorize the Department to issue a Determination Notice to the Development Owner. The Determination Notice, if authorized by the Board, will confirm that the Development satisfies the requirements of the QAP and Rules in accordance with the Code, §42(m)(1)(D).

(f) Certification of Tax Exempt Applications with New Docket Numbers. Applications that are processed through the Department review and evaluation process and receive an affirmative Board Determination, but do not close the bonds prior to the bond reservation expiration date, and subsequently have that docket number withdrawn from the TBRB, may have their Determination Notice reinstated. The Applicant would need to receive a new docket number from the TBRB. One of the following must apply:

(1) The new docket number must be issued in the same program year as the original docket number and must not be more than four (4) months from the date the original application was withdrawn from the TBRB. The application must remain unchanged. This means that at a minimum, the following cannot have changed: site control, total number of units, unit mix (bedroom sizes and income restrictions), design/site plan documents, financial structure including bond and Housing Tax Credit amounts, development costs, rent schedule, operating expenses, sources and uses, ad valorem tax exemption status, target population, scoring criteria (TDHCA issues) or TBRB priority status including the effect on the inclusive capture rate. Note that the entities involved in the Applicant entity and Developer cannot change; however, the certification can be submitted even if the lender, syndicator or issuer changes, as long as the financing structure and terms remain unchanged. Notifications under §50.9(h)(8) of this chapter are not required to be reissued. In the event that the Department's Board has already approved the Application for tax credits, the Application is not required to be presented to the Board again (unless there is public opposition) and a revised Determination Notice will be issued once notice of the assignment of a new docket number has been provided to the Department and the Department has confirmed that the capture rate and market demand remain acceptable. This certification must be submitted no later than thirty (30) days after the date the TBRB issues the new docket number and no later than thirty (30) days before the anticipated closing. In the event that the Department's Board has not yet approved the Application, the Application will continue to be processed and ultimately provided to the Board for consideration. This certification must be submitted no later than thirty (30) days after the date the TBRB issues the new docket number and no later than forty-five (45) days before the anticipated Department's Board meeting date; or

(2) If there are changing to the Application as referenced in paragraph (1) of this subsection, the Applicant will be required to submit a new Application in full, along with the applicable fees, to be reviewed and evaluated in its entirety for a new determination notice to be issued.

§50.13. Commitment and Determination Notices; Agreement and Election Statement; Documentation Submission Requirements.

(a) Commitment and Determination Notices. If the Board approves an Application for a Housing Tax Credit Allocation, the Department will:

(1) If the Application is for a commitment from the State Housing Credit Ceiling, issue a Commitment Notice to the Development Owner which shall:

(A) Confirm that the Board has approved the Application; and

(B) State the Department's commitment to make a Housing Credit Allocation to the Development Owner in a specified amount, subject to the feasibility determination described in §50.16 of this chapter, and compliance by the Development Owner with the remaining requirements of this chapter and any other terms and conditions set forth therein by the Department. This commitment shall expire on the date specified therein unless the Development Owner indicates acceptance of the commitment by executing the Commitment Notice, pays the required fee specified in §50.20 of this chapter, and satisfies any other conditions set forth therein by the Department. The Commitment Notice expiration date may not be extended;

(2) If the Application regards a Tax-Exempt Bond Development, issue a Determination Notice to the Development Owner which shall:

(A) Confirm the Board's determination that the Development satisfies the requirements of this QAP; and

(B) State the Department's commitment to issue IRS Form(s) 8609 to the Development Owner in a specified amount, subject to the requirements set forth in §50.12 of this chapter and compliance by the Development Owner with all applicable requirements of this chapter and any other terms and conditions set forth therein by the Department. The Determination Notice shall expire on the date specified therein unless the Development Owner indicates acceptance by executing the Determination Notice and paying the required fee specified in §50.20 of this chapter. The Determination Notice shall also expire unless the Development Owner satisfies any conditions set forth therein by the Department. The Determination Notice expiration date may not be extended;

(3) Notify, in writing, the mayor or other equivalent chief executive officer of the municipality in which the Property is located informing him/her of the Board's issuance of a Commitment Notice or Determination Notice, as applicable;

(4) A Commitment or Determination Notice shall not be issued with respect to any Development for an unnecessary amount or where the cost for the total development, acquisition, construction or Rehabilitation exceeds the limitations established from time to time by

the Department and the Board, unless the Department staff make a recommendation to the Board based on the need to fulfill the goals of the Housing Tax Credit Program as expressed in this QAP and Rules, and the Board accepts the recommendation. The Department's recommendation to the Board shall be clearly documented;

(5) A Commitment or Determination Notice shall not be issued with respect to the Applicant, the Development Owner, the General Contractor, or any Affiliate of the General Contractor that is active in the ownership or Control of one or more other low-income rental housing properties in the state of Texas administered by the Department that is in Material Noncompliance with the LURA (or any other document containing an Extended Low-income Housing Commitment) or the program rules in effect for such property, as described in Chapter 60 of this title;

(6) The executed Commitment or Determination Notice must be returned to the Department on the date specified within the Commitment Notice or Determination Notice, which shall be no earlier than ten (10) days after the effective date of the Notice.

(b) Agreement and Election Statement. Together with the Development Owner's acceptance of the Carryover Allocation, the Development Owner may execute an Agreement and Election Statement, in the form prescribed by the Department, for the purpose of fixing the Applicable Percentage for the Development as that for the month in which the Carryover Allocation was accepted (or the month the bonds were closed for Tax-Exempt Bond Developments), as provided in the Code, §42(b)(2). Current Treasury Regulations, §1.42-8(a)(1)(v), suggest that in order to permit a Development Owner to make an effective election to fix the Applicable Percentage for a Development (receiving credits from the State Housing Credit Ceiling), the Carryover Allocation Document must be executed by the Department and the Development Owner within the same month. The Department staff will cooperate with a Development Owner, as possible or reasonable; to assure that the Carryover Allocation Document can be so executed.

(c) Documentation Submission Requirements at Commitment of Funds. No later than the date the Commitment Notice or Determination Notice is executed by the Applicant and returned to the Department with the appropriate Commitment or Determination Fee as further described in §50.20(f) of this chapter, the following documents must also be provided to the Department. Failure to provide these documents may cause the Commitment or Determination to be rescinded. For each Applicant all of the following must be provided:

(1) Evidence that the entity has the authority to do business in Texas in the form of a Certificate of Filing from the Texas Secretary of State;

(2) A Certificate of Account Status from the Texas Comptroller of Public Accounts or, if such a Certificate is not available because the entity is newly formed, a statement to such effect; and a Certificate of Organization from the Texas Secretary of State;

(3) Copies of the entity's governing documents, including, but not limited to, its Articles of Incorporation, Articles of Organization, Certificate of Limited Partnership, Bylaws, Regulations and/or Partnership Agreement; and

(4) Evidence that the signer(s) of the Application have the authority to sign on behalf of the Applicant in the form of a corporate resolution or by-laws which indicate same from the sub-entity in Control and that those Persons signing the Application constitute all Persons required to sign or submit such documents.

§50.14. Carryover; 10% Test; Commencement of Substantial Construction.

(a) Carryover. All Developments which received a Commitment Notice, and will not be placed in service and receive IRS Form 8609 in the year the Commitment Notice was issued, must submit the Carryover documentation to the Department no later than November 2 of the year in which the Commitment Notice is issued pursuant to §42(h)(1)(C) of this Code.

(1) Commitments for credits will be terminated if the Carryover documentation, or an approved extension, has not been received by this deadline. In the event that a Development Owner intends to submit the Carryover documentation in any month preceding November of the year in which the Commitment Notice is issued, in order to fix the Applicable Percentage for the Development in that month, it must be submitted no later than the first Friday in the preceding month.

(2) If the financing structure, syndication rate, amount of debt or syndication proceeds are revised at the time of Carryover from what was proposed in the original Application, applicable documentation of such changes must be provided and the Development may be reevaluated by the Department.

(3) The Carryover Allocation format must be properly completed and delivered to the Department as prescribed by the Carryover Allocation Procedures Manual.

(4) All Carryover Allocations will be contingent upon the Development Owner providing evidence that the Development site is still under control of the Development Owner. For purposes of this paragraph, site control must be identical to the same Development Site that was submitted at the time of Application Submission.

(5) The Department will not execute a Carryover Allocation Agreement with any Development Owner having any member in Material Noncompliance on October 1, 2010.

(b) 10% Test. No later than six (6) months from the date the Carryover Allocation Document is executed by the Department and the Development Owner, more than 10% of the Development Owner's reasonably expected basis must have been incurred pursuant to §42(h)(1)(E)(i) and (ii) of the Internal Revenue Code (as amended by The Housing and Economic Recovery Act of 2008) and Treasury Regulations, §1.42-6. The evidence to support the satisfaction of this requirement must be submitted to the Department no later than July 1 of the year following the execution of the Carryover Allocation Document in a format prescribed by the Department. At the time of submission of the documentation, the Development Owner must also submit a Management Plan and an Affirmative Marketing Plan as further described in the Carryover Allocation Procedures Manual. Evidence must be provided at this time of attendance of the Development Owner or management company at Department-approved Fair Housing training relating to leasing and management issues for at least five (5) hours and the Development architect and engineer at Department-approved Fair Housing training relating to design issues for at least five (5) hours on or before the time the 10% Test Documentation is submitted. Certifications must not be older than two (2) years from the date of submission of the 10% Test Documentation. The 10% Test Documentation will be contingent upon the following, in addition to all other conditions placed upon the Application in the Commitment Notice:

(1) Evidence that the Development Owner has purchased, transferred, leased or otherwise has ownership of, the Development Site;

(2) A current original plat or survey of the land, prepared by a duly licensed Texas Registered Professional Land Surveyor. Such survey shall conform to standards prescribed in the Manual of Practice for Land Surveying in Texas as promulgated and amended from time

to time by the Texas Surveyors Association as more fully described in the Carryover Procedures Manual;

(3) For all Developments involving New Construction or Adaptive Reuse, evidence of the availability of all necessary utilities/services to the Development site must be provided. Necessary utilities include natural gas (if applicable), electric, trash, water, and sewer. Such evidence must be a letter or a monthly utility bill from the appropriate municipal/local service provider. If utilities are not already accessible, then the letter must clearly state: an estimated time frame for provision of the utilities, an estimate of the infrastructure cost necessary to obtain service, and an estimate of any portion of that cost that will be borne by the Development Owner. Letters must be from an authorized individual representing the organization which actually provides the services. Such documentation should clearly indicate the Development Site. If utilities are not already accessible (undeveloped areas), then the letter should not be older than three (3) months from the first day of the Application Acceptance Period;

(4) The Development Owner must submit evidence of having commenced and continued substantial construction activities as defined in Chapter 60 of this title.

§50.15. LURA, Cost Certification.

(a) Land Use Restriction Agreement (LURA). The Development Owner must request a LURA from the Department no later than the date specified in Chapter 60 of this title, the Department's Compliance Rules. The Development Owner must complete, date, sign and acknowledge before a notary public the LURA and send the original to the Department for execution. The initial compliance and monitoring fee must be included, accompanied by a statement, signed by the Owner, indicating the start of the Development's Credit Period and the earliest placed in service date for the Development buildings. After receipt of the signed LURA from the Department, the Development Owner shall then record the LURA, along with any and all exhibits attached thereto, in the real property records of the county where the Development is located and return the original document, duly certified as to recordation by the appropriate county official, to the Department no later than the date that the Cost Certification Documentation is submitted to the Department. If any liens (other than mechanics' or materialmen's liens) shall have been recorded against the Development and/or the Property prior to the recording of the LURA, the Development Owner shall obtain the subordination of the rights of any such lienholder, or other effective consent, to the survival of certain obligations contained in the LURA, which are required by §42(h)(6)(E)(ii) of the Code to remain in effect following the foreclosure of any such lien. Receipt of such certified recorded original LURA by the Department is required prior to issuance of IRS Form 8609. A representative of the Department, or assigns, shall physically inspect the Development for compliance with the Application and the representations, warranties, covenants, agreements and undertakings contained therein. Such inspection will be conducted before the IRS Form 8609 is issued for a building, but it shall be conducted in no event later than the end of the second calendar year following the year the last building in the Development is placed in service. The Development Owner for Tax-Exempt Bond Developments shall obtain a subordination agreement wherein the lien of the mortgage is subordinated to the LURA. The LURA shall contain any provision which requires the Development Owner to restrict rents and incomes at any AMGI level, as approved by the Board. The restricted gross rents for any AMGI level outlined in the LURA will be calculated in accordance with §42(g)(2)(A), Internal Revenue Code.

(b) Cost Certification. The Cost Certification Procedures Manual sets forth the documentation required for the Department to perform a feasibility analysis in accordance with §42(m)(2)(C)(i)(II), Internal Revenue Code, and determine the final Credit to be allocated to the Development.

(1) To request IRS Forms 8609, Developments must have:

(A) Placed in Service by December 31 of the year the Commitment Notice was issued if a Carryover Allocation was not requested and received; or December 31 of the second year following the year the Carryover Allocation Agreement was executed;

(B) Scheduled a final construction inspection in accordance with Chapter 60 of this title, the Department's Compliance Monitoring Policies and Procedures;

(C) Informed the Department of and received written approval for all Development amendments in accordance with §50.17(c) of this chapter;

(D) Submitted to the Department the LURA in accordance with subsection (a) of this section;

(E) Paid all applicable Department fees; and

(F) Prepared all Cost Certification documentation as more fully described in the Cost Certification Procedures Manual including:

(i) Carryover Allocation Agreement/Determination Notice and Election Statement;

(ii) Owner's Statement of Certification;

(iii) Owner Summary;

(iv) Evidence of Nonprofit and CHDO Participation;

(v) Evidence of Historically Underutilized Business (HUB) Participation;

(vi) Development Summary;

(vii) As-Built Survey;

(viii) Closing Statement;

(ix) Title Policy;

(x) Evidence of Placement in Service;

(xi) Independent Auditor's Reports;

(xii) Total Development Cost Schedule;

(xiii) AIA Form G702 and G703, Application and Certificate for Payment;

(xiv) Rent Schedule;

(xv) Utility Allowance;

(xvi) Annual Estimated Operating Expenses and 15-Year Proforma;

(xvii) Current Annual Operating Statement and Rent Roll;

(xviii) Final Sources of Funds;

(xix) Executed Limited Partnership Agreement;

(xx) Loan Agreement or Firm Commitment;

(xxi) Architect's Certification of Fair Housing Requirements; and

(xxii) TDHCA Compliance Workshop Certificate.

(2) Required Cost Certification documentation must be received by the Department no later than January 15 following the year

the Credit Period begins. Any Developments issued a Commitment Notice or Determination Notice that fails to submit its Cost Certification documentation by this deadline will be reported to the IRS and the Owner will be required to submit a request for extension consistent with §50.20(l) of this chapter;

(3) The Department will perform an initial evaluation of the Cost Certification documentation within forty-five (45) days from the date of receipt and notify the Development Owner in a deficiency letter of all additional required documentation. Any deficiency letters issued to the Development Owner pertaining to the Cost Certification documentation will also be copied to the syndicator. The Department will issue IRS Forms 8609 no later than ninety (90) days from the date that all required documents have been received;

(4) The Department will perform an evaluation to determine if the Applicant is in Material Noncompliance with the LURA (or any other document containing an Extended Low-income Housing Commitment) or the program rules in effect for the subject property, as described in Chapter 60 of this title, prior to issuance of IRS Forms 8609.

§50.16. Housing Credit Allocations.

(a) In making a commitment of a Housing Credit Allocation under this chapter, the Department shall rely upon information contained in the Application to determine whether a building is eligible for the credit under the Code, §42. The Development Owner shall bear full responsibility for claiming the credit and assuring that the Development complies with the requirements of the Code, §42. The Department shall have no responsibility for ensuring that a Development Owner who receives a Housing Credit Allocation from the Department will qualify for the tax credit.

(b) The Housing Credit Allocation Amount shall not exceed the dollar amount the Department determines is necessary for the financial feasibility and the long term viability of the Development throughout the affordability period. (§2306.6711(b)) Such determination shall be made by the Department at the time of issuance of the Commitment Notice or Determination Notice; at the time the Department makes a Housing Credit Allocation; and as of the date each building in a Development is placed in service. Any Housing Credit Allocation Amount specified in a Commitment Notice, Determination Notice or Carryover Allocation Document is subject to change by the Department based upon such determination. Such a determination shall be made by the Department based on its evaluation and procedures, considering the items specified in the Code, §42(m)(2)(B), and the Department in no way or manner represents or warrants to any Applicant, sponsor, investor, lender or other entity that the Development is, in fact, feasible or viable.

(c) The General Contractor hired by the Development Owner must meet specific criteria as defined by the General Appropriation Act, Article VII, Rider 8(c). A General Contractor hired by a Development Owner or a Development Owner, if the Development Owner serves as General Contractor must demonstrate a history of constructing similar types of housing without the use of federal tax credits. Evidence must be submitted to the Department, in accordance with §50.9(h)(4)(I) of this chapter, which sufficiently documents that the General Contractor has constructed some housing without the use of Housing Tax Credits. This documentation will be required as a condition of the Commitment Notice or Carryover Allocation Agreement, and must be complied with prior to commencement of construction and at cost certification and final allocation of credits.

(d) An allocation will be made in the name of the Development Owner identified in the related Commitment Notice or Determination Notice. If an allocation is made to a member or Affiliate of the ownership entity proposed at the time of Application, the Department will transfer the allocation to the ownership entity as consistent with the intention of the Board when the Development was selected for an award of tax credits. Any other transfer of an allocation will be subject to review and approval by the Department consistent with §50.17(c) of this chapter. The approval of any such transfer does not constitute a representation to the effect that such transfer is permissible under §42 of the Code or without adverse consequences thereunder, and the Department may condition its approval upon receipt and approval of complete current documentation regarding the owner including documentation to show consistency with all the criteria for scoring, evaluation and underwriting, among others, which were applicable to the original Applicant.

(e) The Department shall make a Housing Credit Allocation, either in the form of IRS Form 8609, with respect to current year allocations for buildings placed in service, or in the Carryover Allocation Document, for buildings not yet placed in service, to any Development Owner who holds a Commitment Notice which has not expired, and for which all fees as specified in §50.20 of this chapter have been received by the Department and with respect to which all applicable requirements, terms and conditions have been met. For Tax-Exempt Bond Developments, the Housing Credit Allocation shall be made in the form of a Determination Notice. For an IRS Form 8609 to be issued with respect to a building in a Development with a Housing Credit Allocation, satisfactory evidence must be received by the Department that such building is completed and has been placed in service in accordance with the provisions of the Department's Cost Certification Procedures Manual. The Cost Certification documentation requirements will include a certification and inspection report prepared by a Third-Party accessibility specialist to certify that the Development meets all required accessibility standards. IRS Form 8609 will not be issued until the certifications are received by the Department. The Department shall mail or deliver IRS Form 8609 (or any successor form adopted by the Internal Revenue Service) to the Development Owner, with Part I thereof completed in all respects and signed by an authorized official of the Department. The delivery of the IRS Form 8609 will occur only after the Development Owner has complied with all procedures and requirements listed within the Cost Certification Procedures Manual. Regardless of the year of Application to the Department for Housing Tax Credits, the current year's Cost Certification Procedures Manual must be utilized when filing all cost certification materials. A separate Housing Credit Allocation shall be made with respect to each building within a Development which is eligible for a tax credit; provided, however, that where an allocation is made pursuant to a Carryover Allocation Document on a Development basis in accordance with the Code, §42(h)(1)(F), a housing credit dollar amount shall not be assigned to particular buildings in the Development until the issuance of IRS Form 8609s with respect to such buildings. The Department may delay the issuance of IRS Form 8609 if any Development violates the representations of the Application.

(f) In making a Housing Credit Allocation, the Department shall specify a maximum Applicable Percentage, not to exceed the Applicable Percentage for the building permitted by the Code, §42(b), and a maximum Qualified Basis amount. In specifying the maximum Applicable Percentage and the maximum Qualified Basis amount, the Department shall disregard the first-year conventions described in the Code, §42(f)(2)(A) and (3)(B). The Housing Credit Allocation made by the Department shall not exceed the amount necessary to support the extended low-income housing commitment as required by the Code, §42(h)(6)(C)(i).

(g) Development inspections shall be required to show that the Development is built or rehabilitated according to construction Threshold Criteria and Development characteristics identified at application.

At a minimum, all Development inspections must meet Uniform Physical Condition Standards (UPCS) as referenced in Treasury Regulation §1.42-5(d)(2)(ii) and include an inspection for quality during the construction process while defects can reasonably be corrected and a final inspection at the time the Development is placed in service. All such Development inspections shall be performed by the Department or by an independent Third Party inspector acceptable to the Department. The Development Owner shall pay all fees and costs of said inspections as described in §50.20 of this chapter. Details regarding the construction inspection process are set forth in the Department Rule Chapter 60 of this title, the Department's Compliance Monitoring Policies and Procedures. (§2306.081; General Appropriation Act, Article VII, Rider 8(b))

(h) After the entire Development is placed in service, which must occur prior to the deadline specified in the Carryover Allocation Document and as further outlined in §50.15 of this chapter, the Development Owner shall be responsible for furnishing the Department with documentation which satisfies the requirements set forth in the Cost Certification Procedures Manual. For purposes of this title, and consistent with IRS Notice 88-116, the placed in service date for a new or existing building used as residential rental property is the date on which the building is ready and available for its specifically assigned function and more specifically when the first Unit in the building is certified as being suitable for occupancy in accordance with state and local law and as certified by the appropriate local authority or registered architect as ready for occupancy. The Cost Certification must be submitted for the entire Development; therefore partial Cost Certifications are not allowed. The Department may require copies of invoices and receipts and statements for materials and labor utilized for the New Construction or Rehabilitation and, if applicable, a closing statement for the acquisition of the Development as well as for the closing of all interim and permanent financing for the Development. If the Development Owner does not fulfill all representations and commitments made in the Application, the Department may make reasonable reductions to the tax credit amount allocated via the IRS Form 8609, may withhold issuance of the IRS Form 8609s until these representations and commitments are met, and/or may terminate the allocation, if appropriate corrective action is not taken by the Development Owner.

(i) The Board at its sole discretion may allocate credits to a Development Owner in addition to those awarded at the time of the initial Carryover Allocation in instances where there is bona fide substantiation of cost overruns and the Department has made a determination that the allocation is needed to maintain the Development's financial viability.

(j) The Department may, at any time and without additional administrative process, determine to award credits to Developments previously evaluated and awarded credits if it determines that such previously awarded credits are or may be invalid and the owner was not responsible for such invalidity.

(k) If an Applicant returns a full credit allocation after the Carryover Allocation deadline required for that allocation, the Department will impose a penalty on the score for any Competitive Housing Tax Credit Applications submitted by that Applicant or any Affiliate of that Applicant for any Application in an Application Round occurring concurrent to the return of credits or if no Application Round is pending the Round immediately following the return of credits unless otherwise exempted in accordance with the Board's policy pursuant to the implementation of The Housing and Economic Recovery Act of 2008, H.R. 3221, in September 2008. The penalty will be assessed in an amount that reduces the Applicant's final awarded score by an additional 20%.

§50.17. Board Reevaluation, Appeals Process; Provision of Information or Challenges Regarding Applications; Amendments; Housing Tax Credit and Ownership Transfers; Sale of Tax Credit Properties; Withdrawals; Cancellations; Alternative Dispute Resolution.

(a) Board Reevaluation. (§2306.6731(b)) Regardless of development stage, the Board shall reevaluate a Development that undergoes a substantial change between the time of initial Board approval of the Development and the time of issuance of a Commitment Notice or Determination Notice for the Development. For the purposes of this subsection, substantial change shall be those items identified in subsection (d)(4) of this section. The Board may revoke any Commitment Notice or Determination Notice issued for a Development that has been unfavorably reevaluated by the Board.

(b) Appeals Process. (§2306.6715) An Applicant may appeal decisions made by the Department as follows.

(1) The decisions that may be appealed are identified in subparagraphs (A) - (D) of this paragraph.

(A) A determination regarding the Application's satisfaction of:

(i) Eligibility Requirements;

(ii) Disqualification or debarment criteria;

(iii) Pre-Application or Application Threshold Criteria;

(iv) Underwriting Criteria;

(B) The scoring of the Application under the Application Selection Criteria; and

(C) A recommendation as to the amount of Housing Tax Credits to be allocated to the Application;

(D) Any Department decision that results in termination of an Application.

(2) An Applicant may not appeal a decision made regarding an Application filed by another Applicant.

(3) An Applicant must file its appeal in writing with the Department not later than the seventh day after the date the Department publishes the results of any stage of the Application evaluation process identified in §50.9 of this chapter. In the appeal, the Applicant must specifically identify the Applicant's grounds for appeal, based on the original Application and additional documentation filed with the original Application. If the appeal relates to the amount of Housing Tax Credits recommended to be allocated, the Department will provide the Applicant with the underwriting report upon request.

(4) The Executive Director of the Department shall respond in writing to the appeal not later than the 14th day after the date of receipt of the appeal. If the Applicant is not satisfied with the Executive Director's response to the appeal, the Applicant may appeal directly in writing to the Board, provided that an appeal filed with the Board under this subsection must be received by the Board before:

(A) The seventh day preceding the date of the Board meeting at which the relevant commitment decision is expected to be made; or

(B) The third day preceding the date of the Board meeting described by subparagraph (A) of this paragraph, if the Executive Director does not respond to the appeal before the date described by subparagraph (A) of this paragraph;

(5) Board review of an appeal under paragraph (4) of this subsection is based on the original Application and additional documentation filed with the original Application. The Board may not re-

view any information not contained in or filed with the original Application. The decision of the Board regarding the appeal is final;

(6) The Department will post to its website an appeal filed with the Department or Board and any other document relating to the processing of the appeal. (§2306.6717(a)(5))

(c) Provision of Information or Challenges Regarding Applications from Unrelated Entities to the Application. The Department will address information or challenges received from unrelated entities to a specific 2010 active Application, utilizing a preponderance of the evidence standard, as stated in paragraphs (1) - (3) of this subsection, provided the information or challenge includes a contact name, telephone number, fax number and e-mail address of the person providing the information or challenge and must be received by the Department no later than June 15, 2010:

(1) Within fourteen (14) business days of the receipt of the information or challenge, the Department will post all information and challenges received (including any identifying information) to the Department's website;

(2) Within seven (7) business days of the receipt of the information or challenge, the Department will notify the Applicant related to the information or challenge. The Applicant will then have seven (7) business days to respond to all information and challenges provided to the Department; and

(3) Within fourteen (14) business days of the receipt of the response from the Applicant, the Department will evaluate all information submitted and other relevant documentation related to the investigation. This information may include information requested by the Department relating to this evaluation. The Department will post its determination summary to its website. Any determinations made by the Department cannot be appealed by any party unrelated to the Applicant.

(d) Amendment of Application Subsequent to Allocation by Board. (§2306.6712 and §2306.6717(a)(4))

(1) If a proposed modification would materially alter a Development approved for an allocation of a Housing Tax Credit, or if the Applicant has altered any selection criteria item for which it received points, the Department shall require the Applicant to file a formal, written request for an amendment to the Application.

(2) The Executive Director of the Department shall require the Department staff assigned to underwrite Applications to evaluate the amendment and provide an analysis and written recommendation to the Board. The appropriate party monitoring compliance during construction in accordance with §50.18 of this chapter shall also provide to the Board an analysis and written recommendation regarding the amendment. For amendments which require Board approval, the amendment request must be received by the Department at least thirty (30) days prior to the Board meeting where the amendment will be considered.

(3) The Board must vote on whether to approve an amendment. The Board by vote may reject an amendment and, if appropriate, rescind a Commitment Notice or terminate the allocation of Housing Tax Credits and reallocate the credits to other Applicants on the Waiting List if the Board determines that the modification proposed in the amendment:

(A) Would materially alter the Development in a negative manner; or

(B) Would have adversely affected the selection of the Application in the Application Round.

(4) Material alteration of a Development includes, but is not limited to:

(A) A significant modification of the site plan;

(B) A modification of the number of units or bedroom mix of units;

(C) A substantive modification of the scope of tenant services;

(D) A reduction of 3% or more in the square footage of the units or common areas;

(E) A significant modification of the architectural design of the Development;

(F) A modification of the residential density of the Development of at least 5%;

(G) An increase or decrease in the site acreage of greater than 10% from the original site under control and proposed in the Application; and

(H) Any other modification considered significant by the Board.

(5) In evaluating the amendment under this subsection, the Department staff shall consider whether the need for the modification proposed in the amendment was:

(A) Reasonably foreseeable by the Applicant at the time the Application was submitted; or

(B) Preventable by the Applicant.

(6) This section shall be administered in a manner that is consistent with the Code, §42.

(7) Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and monitor regarding the amendment will be posted to the Department's website and the Applicant will be notified of the posting.

(8) In the event that an Applicant or Developer seeks to be released from the commitment to serve the income level of tenants targeted in the Real Estate Analysis Report at the time of the Commitment Notice issuance, as approved by the Board, the following procedure will apply. For amendments that involve a reduction in the total number of Low-Income Units being served, or a reduction in the number of Low-Income Units at any level of AMGI, as approved by the Board, evidence must be presented to the Department that includes written confirmation from the lender and syndicator that the Development is infeasible without the adjustment in Units. The Board may or may not approve the amendment request; however, any affirmative recommendation to the Board is contingent upon concurrence from the Real Estate Analysis Division that the Unit adjustment (or an alternative Unit adjustment) is necessary for the continued feasibility of the Development. Additionally, if it is determined by the Department that the allocation of credits would not have been made in the year of allocation because the loss of low-income targeting points would have resulted in the Application not receiving an allocation, and the amendment is approved by the Board, the approved amendment will carry a penalty that prohibits the Applicant and all Persons or entities with any ownership interest in the Application (excluding any tax credit purchaser/syndicator), from participation in the Housing Tax Credit Program (for both the Competitive Housing Tax Credit Developments and Tax-Exempt Bond Developments) for twenty-four (24) months from the time that the amendment is approved.

(e) Housing Tax Credit and Ownership Transfers. (§2306.6713) A Development Owner may not transfer an allocation of Housing Tax Credits or ownership of a Development supported with an allocation of Housing Tax Credits to any Person including an Affiliate of the Development Owner unless the Development Owner obtains the Executive Director's prior, written approval of the transfer. The Executive Director may not unreasonably withhold approval of the transfer.

(1) Transfers (other than an Affiliate included in the ownership structure) will not be approved prior to the issuance of IRS Forms 8609 unless the Development Owner can provide evidence that a hardship is creating the need for the transfer (potential bankruptcy, removal by a partner, etc.). A Development Owner seeking Executive Director approval of a transfer and the proposed transferee must provide to the Department a copy of any applicable agreement between the parties to the transfer, including any third-party agreement with the Department.

(2) A Development Owner seeking Executive Director approval of a transfer must provide the Department with documentation requested by the Department, including but not limited to, a list of the names of transferees and Related Parties; and detailed information describing the experience and financial capacity of transferees and related parties. All transfer requests must disclose the reason for the request. The Development Owner shall certify to the Executive Director that the tenants in the Development have been notified in writing of the transfer before the 30th day preceding the date of submission of the transfer request to the Department. Not later than the fifth working day after the date the Department receives all necessary information under this section, the Department shall conduct a qualifications review of a transferee to determine the transferee's past compliance with all aspects of the Housing Tax Credit Program, LURAs; and the sufficiency of the transferee's experience with Developments supported with Housing Credit Allocations. If the viable operation of the Development is deemed to be in jeopardy by the Department, the Department may authorize changes that were not contemplated in the Application.

(3) As it relates to the Credit Cap further described in §50.6(d) of this chapter, the credit cap will not be applied in the following circumstances:

(A) In cases of transfers in which the syndicator, investor or limited partner is taking over ownership of the Development and not merely replacing the general partner; or

(B) In cases where the General Partner is being replaced if the award of credits was made at least five (5) years prior to the transfer request date.

(f) Sale of Certain Tax Credit Properties. Consistent with §2306.6726, Texas Government Code, not later than two (2) years before the expiration of the Compliance Period, a Development Owner who agreed to provide a right of first refusal under §2306.6725(b)(1), Texas Government Code and who intends to sell the property shall notify the Department of its intent to sell.

(1) The Development Owner shall notify Qualified Nonprofit Organizations and tenant organizations of the opportunity to purchase the Development. The Development Owner may:

(A) During the first six-month period after notifying the Department, negotiate or enter into a purchase agreement only with a Qualified Nonprofit Organization that is also a community housing development organization as defined by the Federal Home Investment Partnership Program (HOME);

(B) During the second six-month period after notifying the Department, negotiate or enter into a purchase agreement with any Qualified Nonprofit Organization or tenant organization; and

(C) During the year before the expiration of the compliance period, negotiate or enter into a purchase agreement with the Department or any Qualified Nonprofit Organization or tenant organization approved by the Department.

(2) Notwithstanding items for which points were received consistent with §50.9(i) of this chapter, a Development Owner may sell the Development to any purchaser after the expiration of the compliance period if a Qualified Nonprofit Organization or tenant organization does not offer to purchase the Development at the minimum price provided by §42(i)(7), Internal Revenue Code of 1986 (26 U.S.C. §42(i)(7)), and the Department declines to purchase the Development.

(g) Withdrawals. An Applicant may withdraw an Application prior to receiving a Commitment Notice, Determination Notice, Carryover Allocation Document or Housing Credit Allocation, or may cancel a Commitment Notice or Determination Notice by submitting to the Department a notice, as applicable, of withdrawal or cancellation, and making any required statements as to the return of any tax credits allocated to the Development at issue.

(h) Cancellations. The Department may cancel a Commitment Notice, Determination Notice or Carryover Allocation prior to the issuance of IRS Form 8609 with respect to a Development if:

(1) The Applicant or the Development Owner, or the Development, as applicable, fails to meet any of the conditions of such Commitment Notice or Carryover Allocation or any of the undertakings and commitments made by the Development Owner in the Applications process for the Development;

(2) Any statement or representation made by the Development Owner or made with respect to the Development Owner or the Development is untrue or misleading;

(3) An event occurs with respect to the Applicant or the Development Owner which would have made the Development's Application ineligible for funding pursuant to §50.5 of this chapter if such event had occurred prior to issuance of the Commitment Notice or Carryover Allocation; or

(4) The Applicant or the Development Owner or the Development, as applicable, fails to comply with these Rules or the procedures or requirements of the Department.

(i) Alternative Dispute Resolution Policy. In accordance with §2306.082, Texas Government Code, it is the Department's policy to encourage the use of appropriate alternative dispute resolution procedures ("ADR") under the Governmental Dispute Resolution Act, Chapter 2010, Texas Government Code, to assist in resolving disputes under the Department's jurisdiction. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation. Except as prohibited by the Department's ex parte communications policy, the Department encourages informal communications between Department staff and Applicants, and other interested persons, to exchange information and informally resolve disputes. The Department also has administrative appeals processes to fairly and expeditiously resolve disputes. If at any time an Applicant or other person would like to engage the Department in an ADR procedure, the person may send a proposal to the Department's Dispute Resolution Coordinator. For additional information on the Department's ADR Policy, see the Department's General Administrative Rule on ADR at §1.17 of this title.

§50.18. Compliance Monitoring and Material Noncompliance.

The Code, §42(m)(1)(B)(iii), requires the Department as the housing credit agency to include in its QAP a procedure that the Department will follow in monitoring Developments for compliance with the provisions of the Code, §42 and in notifying the IRS of any noncompliance of

which the Department becomes aware. Detailed compliance rules and procedures for monitoring are set forth in Chapter 60 of this title.

§50.19. Department Records; Application Log; IRS Filings.

(a) Department Records. At all times during each calendar year the Department shall maintain a record of the following:

(1) The cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Commitment Notices during such calendar year;

(2) The cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Carryover Allocation Documents during such calendar year;

(3) The cumulative amount of Housing Credit Allocations made during such calendar year; and

(4) The remaining unused portion of the State Housing Credit Ceiling for such calendar year.

(b) Application Log. (§2306.6702(a)(3) and §2306.6709) The Department shall maintain for each Application an Application Log that tracks the Application from the date of its submission. The Application Log will contain, at a minimum, the information identified in paragraphs (1) - (9) of this subsection.

(1) The names of the Applicant and all General Partners of the Development Owner, the owner contact name and phone number, and full contact information for all members of the Development Team;

(2) The name, physical location, and address of the Development, including the relevant Uniform State Service Region of the state;

(3) The number of Units and the amount of Housing Tax Credits requested for allocation by the Department to the Applicant;

(4) Any Set-Aside category under which the Application is filed;

(5) The requested and awarded score of the Application in each scoring category adopted by the Department under the Qualified Allocation Plan;

(6) Any decision made by the Department or Board regarding the Application, including the Department's decision regarding whether to underwrite the Application and the Board's decision regarding whether to allocate Housing Tax Credits to the Development;

(7) The names of individuals making the decisions described by paragraph (6) of this subsection, including the names of Department staff scoring and underwriting the Application, to be recorded next to the description of the applicable decision;

(8) The amount of Housing Tax Credits allocated to the Development; and

(9) A dated record and summary of any contact between the Department staff, the Board, and the Applicant or any Related Parties.

(c) IRS Filings. The Department shall mail to the Internal Revenue Service, not later than the 28th day of the second calendar month after the close of each calendar year during which the Department makes Housing Credit Allocations, a copy of each completed (as to Part I) IRS Form 8609, the original of which was mailed or delivered by the Department to a Development Owner during such calendar year, along with a single completed IRS Form 8610, Annual Low-income Housing Credit Agencies Report. When a Carryover Allocation is made by the Department, a copy of the Carryover Allocation Agreement will be mailed or faxed to the Development Owner by the Department. The original of the Carryover Allocation Document will be retained by the Department and IRS Form 8610 Schedule A will be filed by the Department with IRS Form 8610 for the year in which the allocation is made. The Department shall be authorized to vary from the requirements of this section to the extent required to adapt to changes in IRS requirements.

§50.20. Program Fees; Refunds; Public Information Requests; Adjustments of Fees and Notification of Fees; Extensions; Penalties.

(a) Timely Payment of Fees. All fees must be paid as stated in this section, unless the Executive Director has granted a waiver for specific extenuating and extraordinary circumstances. To be eligible for a waiver, the Applicant must submit a request for a waiver no later than ten (10) business days prior to the deadlines as stated in this section. Any fees, as further described in this section, that are not timely paid will cause an Applicant to be ineligible to apply for tax credits and additional tax credits and ineligible to submit extension requests, ownership changes and Application amendments. Payments made by check, for which insufficient funds are available, may cause the Application, Commitment or Allocation to be terminated.

(b) Pre-Application Fee. Each Applicant that submits a Pre-Application shall submit to the Department, along with such Pre-Application, a non refundable Pre-Application fee, in the amount of $10 per Unit. Units for the calculation of the Pre-Application Fee include all Units within the Development, including tax credit, market rate and owner-occupied Units. Pre-Applications without the specified Pre-Application Fee in the form of a check will not be accepted. Pre-Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as the Managing General Partner of the Development Owner, or Control the Managing General Partner of the Development Owner, will receive a discount of 10% off the calculated Pre-Application fee. (General Appropriation Act, Article VII, Rider 7; §2306.6716(d)) For Tax Exempt Bond Developments with the Department as the issuer, the Applicant shall submit the following fees: $1,000 (payable to TDHCA), $2,000 (payable to Vinson & Elkins, Bond Counsel), and $5,000 (payable to the Texas Bond Review Board).

(c) Application Fee. Each Applicant that submits an Application shall submit to the Department, along with such Application, an Application fee. For Applicants having submitted a Pre-Application which met Pre-Application Threshold and for which a Pre-Application fee was paid, the Application fee will be $20 per Unit. For Applicants not having submitted a Pre-Application, the Application fee will be $30 per Unit. Units for the calculation of the Application Fee include all Units within the Development, including tax credit, market rate and owner-occupied Units. Applications without the specified Application Fee in the form of a check will not be accepted. Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as the Managing General Partner of the Development Owner, or Control the Managing General Partner of the Development Owner, will receive a discount of 10% off the calculated Application fee. (General Appropriation Act, Article VII, Rider 7; §2306.6716(d)) For Tax Exempt Bond Developments with the Department as the Issuer the Applicant shall submit a tax credit application fee of $30 per unit and bond application fee of $10,000. For Tax-Exempt Bond Development refunding Applications, with the Department as the issuer, the Application Fee will be $10,000 unless the refunding is not required to have a TEFRA public hearing, in which case the fee will be $5,000. Those Applications utilizing a local issuer only need to submit the tax credit application fee.

(d) Refunds of Pre-Application or Application Fees. (§2306.6716(c)) Upon written request from the Applicant, the Department shall refund the balance of any fees collected for a Pre-Application or Application that is withdrawn by the Applicant or that is not fully processed by the Department. The amount of refund on Pre-Applications not fully processed by the Department will be

commensurate with the level of review completed. Intake and data entry will constitute 50% of the review, and Threshold review prior to a deficiency issued will constitute 30% of the review. Deficiencies submitted and reviewed constitute 20% of the review. The amount of refund on Applications not fully processed by the Department will be commensurate with the level of review completed. Intake and data entry will constitute 20% of the review, the site visit will constitute 20% of the review, Eligibility and Selection review will constitute 20%, and Threshold review will constitute 20% of the review, and underwriting review will constitute 20%. The Department must provide the refund to the Applicant not later than the 30th day after the date of request.

(e) Third Party Underwriting Fee. Applicants will be notified in writing prior to the evaluation of a Development by an independent external underwriter in accordance with §50.9(d)(6), (e)(3), and (f)(6) of this chapter if such a review is required. The fee must be received by the Department prior to the engagement of the underwriter. The fees paid by the Development Owner to the Department for the external underwriting will be credited against the commitment fee established in subsection (f) of this section, in the event that a Commitment Notice or Determination Notice is issued by the Department to the Development Owner.

(f) Commitment or Determination Notice Fee. Each Development Owner that receives a Commitment Notice or Determination Notice shall submit to the Department, not later than the expiration date on the Commitment or Determination notice, a Commitment or Determination fee equal to 5% of the annual Housing Credit Allocation amount. The Commitment or Determination fee shall be paid by check. If a Development Owner of an Application awarded Competitive Housing Tax Credits has paid a Commitment Fee and returns the credits by November 1, 2010, the Development Owner may receive a refund of 50% of the Commitment Fee. If a Development Owner of an Application awarded Housing Tax Credits associated with Tax-Exempt Bonds has paid a Determination Fee and is not able close on the bond transaction within ninety (90) days of the issuance date of the Determination Notice, the Development Owner may receive a refund of 50% of the Determination Fee. The Determination Fee will not be refundable after ninety (90) days of the issuance date of the Determination Notice.

(g) Compliance Monitoring Fee. Upon receipt of the cost certification, the Department will invoice the Development Owner for compliance monitoring fees. The amount due will equal $40 per tax credit unit. The fee will be collected, retroactively if applicable, beginning with the first year of the credit period. The invoice must be paid prior to the issuance of form 8609. Subsequent anniversary dates on which the compliance monitoring fee payments are due shall be determined by the month the first building is placed in service. For Tax-Exempt Bond Developments with the Department as the issuer, the annual tax credit compliance fee will be paid annually in advance (for the duration of the compliance or affordability period) and is equal to $40/Unit beginning two (2) years from the first payment date of the bonds; the asset management fee is paid in advance and is equal to $25/Unit beginning two (2) years from the first payment date, if applicable. Compliance fees may be adjusted from time to time by the Department.

(h) Building Inspection Fee. The Building Inspection Fee must be paid at the time the Commitment Fee is paid. The Building Inspection Fee for all Developments is $750. Inspection fees in excess of $750 may be charged to the Development Owner not to exceed an additional $250 per Development.

(i) Tax-Exempt Bond Credit Increase Request Fee. As further described in §50.12 of this chapter, requests for increases to the credit amounts to be issued on IRS Forms 8609 for Tax-Exempt Bond Developments must be submitted with a request fee equal to 5% of the amount of the credit increase for one year.

(j) Public Information Requests. Public information requests are processed by the Department in accordance with the provisions of the Texas Government Code, Chapter 552. The Department uses the guidelines promulgated by the Office of the Attorney General to determine the cost of copying, and other costs of production.

(k) Periodic Adjustment of Fees by the Department and Notification of Fees. (§2306.6716(b)) All fees charged by the Department in the administration of the tax credit program will be revised by the Department from time to time as necessary to ensure that such fees compensate the Department for its administrative costs and expenses. The Department shall publish each year an updated schedule of Application fees that specifies the amount to be charged at each stage of the Application process. Unless otherwise determined by the Department, all revised fees shall apply to all Applications in process and all Developments in operation at the time of such revisions.

(l) Extension and Amendment Requests.

(1) All extension requests relating to the Carryover, Documentation for 10% Test, Substantial Construction Commencement, Placed in Service or Cost Certification requirements shall be submitted to the Department in writing and be accompanied by a mandatory non-refundable extension fee in the form of a check in the amount of $2,500. Such requests must be submitted to the Department no later than the date for which an extension is being requested. All requests for extensions totaling less than six (6) months may be approved by the Executive Director and are not required to have Board approval. For extensions that require Board approval, the extension request must be received by the Department at least fifteen (15) business days prior to the Board meeting where the extension will be considered. The extension request shall specify a requested extension date and the reason why such an extension is required. Carryover extension requests shall not request an extended deadline later than December 1st of the year the Commitment Notice was issued. The Department, in its sole discretion, may consider and grant such extension requests for all items. If an extension is required at Cost Certification, the fee of $2,500 must be received by the Department to qualify for issuance of Forms 8609.

(2) Amendment requests must be submitted consistent with §50.17(d) of this chapter. Amendment requests shall be submitted to the Department in writing and be accompanied by a mandatory non-refundable amendment fee in the form of a check in the amount of $2,500. The amendment request will not be considered received until the corresponding fee is received.

(3) The Board may waive extension or amendment fees for good cause.

(m) Penalties. Development Owners who have more tax credits allocated to them than they can substantiate through Cost Certification will return those excess tax credits prior to issuance of 8609's. For Competitive Housing Tax Credit Developments, a penalty fee equal to the one year credit amount of the lost credits (10% of the total unused tax credit amount) will be required to be paid by the Owner prior to the issuance of form 8609's if the tax credits are not returned, and 8609's issued, within one hundred eighty (180) days of the end of the first year of the credit period. This penalty fee may be waived without further Board action if the Department recaptures and re-issues the returned tax credits in accordance with §42, Internal Revenue Code.

§50.21. Manner and Place of Filing All Required Documentation.

(a) All Applications, letters, documents, or other papers filed with the Department must be received only between the hours of 8:00 a.m. and 5:00 p.m. on any day which is not a Saturday, Sunday or a holiday established by law for state employees.

(b) All notices, information, correspondence and other communications under this chapter shall be deemed to be duly given if delivered or sent and effective in accordance with this subsection. Such correspondence must reference that the subject matter is pursuant to the Tax Credit Program and must be addressed to the Housing Tax Credit Program, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas 78711-3941 or for hand delivery or courier to 221 East 11th Street, Austin, Texas 78701 or more current address of the Department as released on the Department's website. Every such correspondence required or contemplated by this chapter to be given, delivered or sent by any party may be delivered in person or may be sent by courier, telecopy, express mail, telex, telegraph or postage prepaid certified or registered air mail (or its equivalent under the laws of the country where mailed), addressed to the party for whom it is intended, at the address specified in this subsection. Regardless of method of delivery, documents must be received by the Department no later than 5:00 p.m. for the given deadline date. Notice by courier, express mail, certified mail, or registered mail will be considered received on the date it is officially recorded as delivered by return receipt or equivalent. Notice by telex or telegraph will be deemed given at the time it is recorded by the carrier in the ordinary course of business as having been delivered, but in any event not later than one business day after dispatch. Notice not given in writing will be effective only if acknowledged in writing by a duly authorized officer of the Department.

(c) If required by the Department, Development Owners must comply with all requirements to use the Department's website to provide necessary data to the Department.

§50.22. Waiver and Amendment of Rules.

(a) The Board, in its discretion, may waive any one or more of these Rules if the Board finds that a waiver is appropriate to fulfill the purposes or policies of Chapter 2306, Texas Government Code, or for other good cause, as determined by the Board.

(b) Section 1.13 of this title may be waived for any person seeking any action by filing a request with the Board.

(c) The Department may amend this chapter and the Rules contained herein at any time in accordance with the Texas Government Code, Chapter 2001.

§50.23. Deadlines for Allocation of Housing Tax Credits (§2306.6724).

(a) Not later than September 30 of each year, the Department shall prepare and submit to the Board for adoption the draft QAP required by federal law for use by the Department in setting criteria and priorities for the allocation of tax credits under the Housing Tax Credit program.

(b) The Board shall adopt and submit to the Governor the QAP not later than November 15 of each year.

(c) The Governor shall approve, reject, or modify and approve the QAP not later than December 1 of each year. (§2306.67022; §42(m)(1))

(d) The Board shall annually adopt a manual, corresponding to the QAP, to provide information on how to apply for Housing Tax Credits.

(e) Applications for Housing Tax Credits to be issued a Commitment Notice during the Application Round in a calendar year must be submitted to the Department not later than March 1.

(f) The Board shall review the recommendations of Department staff regarding Applications and shall issue a list of approved Applications each year in accordance with the Qualified Allocation Plan not later than June 30.

(g) The Board shall approve final commitments for allocations of Housing Tax Credits each year in accordance with the Qualified Allocation Plan not later than July 31, unless unforeseen circumstances prohibit action by that date. In any event, the Board shall approve final commitments for allocations of Housing Tax Credits each year in accordance with the Qualified Allocation Plan not later than September 30. Department staff will subsequently issue Commitment Notices based on the Board's approval. Final commitments may be conditioned on various factors approved by the Board, including resolution of contested matters in litigation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904036
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 475-3916

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CHAPTER 60. COMPLIANCE ADMINISTRATION

SUBCHAPTER A. COMPLIANCE MONITORING

10 TAC §§60.101, 60.109 - 60.112, 60.116 - 60.118, 60.120 - 60.123, 60.126, 60.127

The Texas Department of Housing and Community Affairs (the Department) proposes amendments to Chapter 60, Subchapter A, §§60.101, 60.109 - 60.112, 60.116 - 60.118, 60.120 - 60.123, 60.126 and new §60.127, concerning Compliance Monitoring. The proposed amendments make changes to the Material Noncompliance methodology, the definition of substantial construction, and the evaluation of Uniform Physical Condition Standards reports, and provides the ability for an applicant to request reinstatement of an application that has been terminated due to a previous participation review.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the amended sections are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amended sections as proposed.

Mr. Gerber has also determined that for each year of the first five years the amended sections are in effect, the public benefit anticipated as a result of enforcing the amended sections will be the more efficient organization and use of Department resources. There will be no effect on small businesses or persons. There are no anticipated economic costs to persons who are required to comply with the amended sections as proposed.

The public comment period will be held between September 18, 2009 to October 26, 2009 to receive public input on the amendments to these sections. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2010 Rule Comments, P.O. Box

13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 469-9606. ALL COMMENTS MUST BE RECEIVED BY OCTOBER 26, 2009.

The amendments and new section are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

The amendments and new section affect no other code, article, or statute.

§60.101. Purpose and Overview.

(a) This chapter [~~rule~~] satisfies the requirement of §42(m)(1)(B)(iii) Internal Revenue Code (Code) to provide a procedure that will be followed for monitoring for noncompliance with the provisions of the Code and to notify the Internal Revenue Service of such noncompliance. The Department monitors rental Developments receiving assistance under:

(1) the Housing Tax Credit program (HTC);

(2) the HOME Investment Partnerships program (HOME);

(3) the Tax Exempt Bond program (BOND);

(4) the Housing Trust Fund program (HTF); [~~and~~]

(5) the Community Development Block Grant Disaster Recovery Program (CDBG);[~~.~~]

(6) the Tax Credit Assistance Program; and

(7) the Tax Credit Exchange Program.

(b) All properties monitored by the Department are subject to the Department's enforcement rules, found in Subchapter C of this chapter.

(c) Compliance monitoring begins with the commencement of construction and continues to the end of the long term Affordability Period. The [~~Portfolio Management and~~] Compliance and Asset Oversight Division (CAO) [~~(PMC)~~] monitors to ensure Owners comply with the program rules and regulations, Chapter 2306, Texas Government Code, the Land Use Restriction Agreement (LURA) requirements and conditions, and representations imposed by the Application or award of funds by the Department. These rules do not address forms and other records that may be required of Development Owners by the Internal Revenue Service (IRS) or other governmental entities, whether for purposes of filing annual returns or supporting Development Owner tax positions during an IRS or other governmental audit.

§60.109. Utility Allowances.

(a) The Department will monitor to determine if HTC, BOND, CDBG, HOME, and HTF properties comply with published rent limits which include an allowance for tenant paid utilities. For HTC buildings, if the residents pay utilities directly to the owner of the building or to a third party billing company, and the amount of the bill is based on an allocation method or "ratio utility billing system" (RUBS), this monthly amount will be considered a mandatory fee. For HTC buildings, if the residents pay utilities directly to the owner of the building or to a third party billing company, and the amount of the bill is based on the tenant's actual consumption, owners may account for the utility in an allowance.The rent, plus all mandatory fees, plus an allowance for those utilities paid by the resident directly to a utility provider must be less than the allowable limit. For Non-HTC buildings, owners may account for utilities paid directly to the owner or to a third party billing company in their utility allowance. Where residents are responsible for some, or all, of the utilities--other than telephone, cable, and internet--Development Owners must use a utility allowance that complies with both this section and the applicable program regulations. An Owner may not change utility allowance methods without written approval from the Department. Any such request must include the Utility Allowance Questionnaire found on the Department's website.

(b) Rural Housing Service (RHS) Buildings or buildings with RHS assisted tenants. The applicable utility allowance for the Development will be determined under the method prescribed by the Rural Housing Service (or successor agency). No other utility method described in this section can be used by RHS buildings or buildings with RHS assisted tenants.

(c) HUD-Regulated Buildings layered with any Department program. If neither the building nor any tenant in the building receives RHS rental assistance payment, and the rents and the utility allowances of the building are reviewed by HUD on an annual basis (HUD-regulated Building), the applicable utility allowance for all rent restricted units in the building is the applicable HUD utility allowance. No other utility method described in this section can be used by HUD-regulated Buildings.

(d) Other Buildings. For all other rent-restricted Units, Development Owners must use one of the following methods:

(1) The utility allowance established by the applicable Public Housing Authority (PHA) for the Section 8 Existing Housing Program. The Department will utilize Texas Local Government Code Chapter 392 to determine which PHA is the most applicable to the Development. If the property is located in an area that does not have a municipal, county or regional housing authority that publishes a utility allowance schedule for the Section 8 Existing Housing Program, owners must select an alternative methodology. If the applicable PHA allowance lists flat fees for any utility, those flat fees must be included in the calculation of the utility allowance if the resident is responsible for that utility. If an Owner chooses to implement a methodology as described in paragraphs (2), (3), (4), or (5) of this subsection, for units occupied by Section [~~§~~]8 voucher holders, the utility allowance remains the applicable PHA utility allowance established by the PHA from which the household's voucher is received.

(2) A written estimate from a local utility provider. If there are multiple utility companies that service the Development, the local provider must be a residential utility company that offers service to the residents of the Development requesting the methodology. The Department will use the Texas Electric Choice website: http://www.powertochoose.org/_content/_compare/compare.aspx to verify the availability of service. If the utility company is not listed as a provider in the Development's ZIP code, the request will be denied. Additionally, the estimate must specifically include all "component deregulated charges" for providing the utility service.

(3) The HUD Utility Model Schedule. A utility estimate can be calculated by using the "HUD Utility Model Schedule" that can be found at http://www.huduser.org/datasets/lihtc/html (or successor URL). The rates used must be no older than the rates in effect sixty (60) days prior to the beginning of the ninety (90) day period in which the Owner intends to implement the allowance. For Owners calculating a utility allowance under this methodology, the model, along with all back-up documentation used in the model, must be submitted to the Department, on a CD, within the timeline described in subsection (f) of this section.

(4) An energy consumption model. The utility consumption estimate must be calculated by a properly licensed mechanical engineer or an individual holding a valid Residential Energy Service

Network (RESNET) or Certified Energy Manager (CEM) certification. The individual must not be related to the Owner within the meaning of §267(b) or §707(b) of the Code. The utility consumption estimate must, at minimum, take into consideration specific factors that include, but are not limited to, unit size, building orientation, design and materials, mechanical systems, appliances, and characteristics of building location, or

(5) An allowance based upon an average of the actual use of similarly constructed and sized Units in the building using actual utility usage data and rates, provided that the Development Owner has the written permission of the Department. This methodology is referred to as the "Actual Use Method."

(e) For a Development Owner to use the Actual Use Method they must:

(1) provide a minimum sample size of usage data for at least 5 Continuously Occupied Units of each Unit Type or 20 percent of each Unit Type whichever is greater. *Example 109(1):* A Development has 20 three bedroom one bath Units and 80 three bedroom two bath Units. Each bedroom/bathroom equivalent Unit is within 120 square feet of the same floor area. Data must be supplied for at least 5 of the three bedroom one bath Units and 16 of the three bedroom two bath Units. If there are less than 5 Units of any Unit Type, data for 100 percent of the Unit Type must be provided.

(2) the following information must be scanned onto a CD and submitted to the Department no later than the beginning of the ninety (90) day period in which the Owner intends to implement the allowance, reflecting data no older than sixty (60) days prior to the ninety (90) day implementation period. *Example 109(2):* The utility provider releases the information regarding electric usage at Westover Townhomes on February 5, 2009. The data provided is from February 1, 2008 through January 31, 2009. The Owner must submit the information to the Department no later than March 31, 2009 for the information to be valid.

(A) An Excel spreadsheet listing each unit for which data was obtained to meet the minimum sample size requirement of a Unit Type, the number of bedrooms, bathrooms and square footage for each Unit, the household's move in date, the actual kilowatt usage, for each Unit for which data was obtained, and the rates in place at the time of the submission.

(B) A copy of the request to the utility provider (or billing entity for the utility provider) to provide usage data.

(C) All documentation obtained from the utility provider (or billing entity for the utility provider) and/or copies of actual utility bills gathered from the residents, including all usage data not needed to meet the minimum sample size requirement and any written correspondence from the utility provider.

(D) The rent roll showing occupancy as of the end of the month for the month in which the data was requested from the utility provider.

(E) Documentation of the current utility allowance used by the Development.

(3) Upon receipt of the required information, the Department will determine if the Development Owner has provided the minimum information necessary to calculate an allowance using the Actual Use Method. If so, the Department shall calculate the utility allowance for each bedroom size using the following guidelines:

(A) If data is obtained for more than 20 percent or 5 of each Unit Type, all data will be used to calculate the allowance.

(B) If more than twelve (12) months of data is provided for any Unit, only the data for the most current twelve (12) months will be averaged.

(C) The allowance will be calculated by multiplying the average units of measure for the applicable utility (i.e. kilowatts over the last twelve (12) months by the current rate) for all Unit Types within that bedroom size. For example, if sufficient data is supplied for 18 two bedroom one baths and 12 two bedroom two baths, the data for all 30 Units will be averaged to calculate the allowance for all two bedroom Units.

(D) The allowance will be rounded up to the next whole dollar amount.

(E) If the data submitted indicates zero (0) usage for any month, the data for that unit will not be used to calculate the Utility Allowance.

(4) The Department will complete its evaluation and calculation within ninety (90) days of receipt of all the information requested in paragraph (2) of this subsection.

(5) For newly constructed Developments or Developments that have units which have not been continuously occupied, the Department, on a case by case basis, may use consumption data for units of similar size and construction in the geographic area to calculate the utility allowance.

(f) Effective dates. If the Owner uses the methodologies as described in subsections (b), (c), or (d)(1) of this section, any changes to the allowance can be implemented immediately, but must be implemented for rent due ninety (90) days after the change. For methodologies as described in subsection (d)(2) - (5) of this section, the allowance cannot be implemented until the estimate is submitted to the Department and is made available to the residents by posting in a common area of the leasing office at the Development. This action must be taken by the beginning of the ninety (90) day period in which the Owner intends to implement the utility allowance. With the exception of the methodology described in subsection (d)(5) of this section, if a response is not received by the Department within the ninety (90) day period, the Owner may temporarily use the submission as a safe harbor until the Department provides written authorization (the Owner cannot assume that the allowance is approved by the Department but can operate in good faith prior to notification). Failure to submit the proposed utility allowance to the Department and make it available to the residents will result in a finding of noncompliance.

(g) Requirements for Annual Review. Owners utilizing the methods described in subsection (d)(2) - (5) of this section must once a calendar year submit copies of the utility estimate to the Department and simultaneously make the estimate available to the residents by posting the estimate in a common area of the leasing office at the Development. Changes in utility allowances cannot be implemented until the estimate has been submitted to the Department and made available to the residents by posting in the leasing office and a ninety (90) day period has elapsed. The back up documentation required by the methodology the Owner has chosen must be submitted to the Department for approval no later than October 1st; however, the Department encourages Owners to submit documentation prior to the October 1st deadline in order to ensure that the Department has adequate time to review and respond to the Owner's estimate.

(h) Combining Methodologies. With the exception of HUD regulated buildings and RHS buildings, Owners may combine any methodology described in this section for each utility service type paid directly by the resident and not by or through the Owner of the building (electric, gas etc.). For example, if residents are responsible for

electricity and gas, an Owner may use the appropriate PHA allowance to determine the gas portion of the allowance and use the Actual Use Method to determine the electric portion of the allowance.

(i) Increases in Utility Allowances for Developments with HOME funds. Because the HOME final rule does not provide a grace period for implementing increased utility allowances, changes in utility allowances must be implemented on the published effective date.

(j) The owner shall maintain and make available for inspection by the tenant the data upon which the utility allowance schedule is calculated. Records shall be made available at the resident manager's office during reasonable business hours or, if there is no resident manager, at the dwelling unit of the tenant at the convenience of both the apartment owner and tenant.

§60.110. Lease Requirements (HTC and HOME Properties).

(a) For HTC properties, Revenue Ruling 2004-82 prohibits the eviction or termination of tenancy for other than good cause of low income households throughout the entire Affordability Period and for three years after termination of an extended low-income housing commitment. Owners executing or renewing leases after November 1, 2007 shall specifically state in the lease or in an addendum attached to the lease that evictions or terminations of tenancy for other than good cause are prohibited.

(b) For HOME properties, the HOME Final Rule prohibits Owners from evicting low income residents or refusing to renew a lease except for serious or repeated violations of the terms and conditions of the lease, for violations of applicable federal state or local law, for completion of the tenancy period for transitional housing, or for other good cause. To terminate tenancy, the Owner must serve written notice to the tenant specifying the grounds for the action at least thirty (30) days before the termination of tenancy. Owners executing or renewing leases after November 1, 2007 shall specifically state in the lease or in an addendum attached to the lease that evictions or non-renewal of leases for other than good cause are prohibited (24 CFR §92.253).

(c) The Department does not determine if an Owner has good cause or if a resident has violated the lease terms. If there is a challenge to a good cause eviction, that determination will be made by a court of competent jurisdiction or an agreement of the parties in arbitration. The Department will rely on the court decision or the agreement of the parties.

(d) HTC and BOND properties must use a lease or lease addendum that requires households to report changes in student status.

(e) Owners of Housing Tax Credit developments are prohibited from locking out or threatening to lock out any development resident, or seizing or threatening to seize the personal property of a resident, except by judicial process or for the purposes of performing necessary repairs or construction work or in cases of emergency. These prohibitions must be included in the lease or lease addendum.

§60.111. Income at Recertification (Housing Tax Credit Properties).

(a) Under the Code, HTC Development Owners elect a minimum set aside requirement of 20/50 or 40/60 (20 percent of the Units restricted to the 50 percent income and rent limits or 40 percent of the Units restricted to the 60 percent income and rent limits). The minimum set aside elected by the Development Owner sets the maximum income and rent limits at the property. The Housing Tax Credit program requires mixed income properties to comply with the Available Unit Rule. Regardless of this section if a household's income exceeds 140 percent of the income limit elected by the minimum set aside, owners must comply with the Available Unit Rule. Many HTC Development Owners agreed to lease Units to households with an annual income and rent lower than the maximum limits (for example at the 30 percent, 40 percent or 50 percent income and rent limits) established by the minimum set aside election of the Owner. This requirement is referred to as "additional occupancy restrictions" and is reflected in the Development's Land Use Restriction Agreement. When monitoring, the Department will examine the actual rent and income levels of all tenants to determine if additional rent and income requirements in the LURA are being met. Household income at recertification for the additional occupancy restrictions will be monitored as follows:

(1) Households initially designated at the 30 percent income and rent limits. If upon recertification, the household's income exceeds the 30 percent limit, the Unit will continue to meet the 30 percent set aside requirement provided that the Owner does not charge rent in excess of the 30 percent rent limits. The household will not be required to vacate the Unit for other than good cause. The Owner will not be found in noncompliance provided that when the household moves out, the next available Unit on the property is leased to a household with an income and rent less than the 30 percent limits. If the household is replaced, the rent for the previously qualified Unit may be increased to the limit established by the minimum set aside, subject to applicable HTC requirements, lease provisions and local tenant-landlord laws.

(2) Households initially designated at the 40 percent income and rent limits. If upon recertification, the household's income exceeds the 40 percent limit, the Unit will continue to meet the 40 percent set aside requirement provided that the Owner does not charge rent in excess of the 40 percent rent limits. The household will not be required to vacate the Unit for other than good cause. The Owner will not be found in noncompliance, provided that when the household moves out, the next available Unit on the property is leased to a household with an income and rent less than the 40 percent limits. If the household is replaced, the rent for the previously qualified Unit may be increased to the limit established by the minimum set aside, subject to applicable HTC requirements, lease provisions and local tenant-landlord laws.

(3) Households initially designated at the 50 percent income and rent limits (for HTC properties with the 40/60 minimum set aside). If upon recertification, the household's income exceeds the 50 percent income limit, the Unit will continue to meet the 50 percent set aside provided that the Owner does not charge rent in excess of the 50 percent rent limits. The household will not be required to vacate the Unit for other than good cause. The Owner will not be found in noncompliance provided that when the household moves out, the next available Unit on the property is leased to a household with an income and rent less than the 50 percent limits. Once the household has been replaced, the rent for the previously qualified Unit may be increased to the limit established by the minimum set aside, subject to applicable HTC requirements, lease provisions and local tenant-landlord laws.

(b) This section does not apply to households designated at the maximum income and rent limits required by the Code. Nor does this section in any way require a Development to lease more Units under the additional occupancy restrictions than established in the LURA.

(c) For those properties that are not required to perform recertifications, households will maintain the designation they had at move in. Owners must ensure that lower rent restrictions are adhered to throughout the household's occupancy.

(d) Preservation, HTF, [~~HOME~~] and BOND Developments, with any market units in one or more buildings (as evidenced in their LURA) must continue to perform annual recertifications of all households residing in program units. Owners of 100 percent low income Developments are not required to perform annual income recertifications. HTC Owners must perform annual income recertifications if the

project has any market rate units. For HTC Developments, the election made on Part II of the 8609 will determine if a building is part of a project. HTC Development Owners must submit Forms 8609 with Part II completed. The Department may also require HTC Owners to complete Form 8821 to permit the Department to confirm the elections with the IRS.

(e) For HTC[~~, Preservation, HTF, and/or BOND~~] Developments in which the LURA requires 100 percent of the units to be leased to income eligible families, the following recertification requirements apply:

(1) To comply with HUD reporting requirements, once every calendar year, the Development must collect a self-certification form from each household that reports the number of household members, the age of each household member, disability status, monthly rental assistance amounts received (if any), and race and ethnicity. In addition, the self certification will collect information about student status to establish ongoing compliance under the HTC and BOND programs. The Development must use the Department's Annual Eligibility Certification to collect this information and must maintain the certification in all household files.

(2) On 100 percent low income Housing Tax Credit developments, households may transfer to any unit within the same project (as determined on Part II of the 8609 for HTC Developments). On mixed income Housing Tax Credit Developments, households may transfer to any unit within the Development if as of their most recent (re) certification, their income was less than 140 percent of the maximum allowable limit. If the owner of a Housing Tax Credit development elected to treat each building as a separate project, households must be certified and low income to transfer to another building.

(3) Owners must review the Annual Eligibility Certification for the following items which would require further action:

(A) Changes in household composition. If members are added to an existing household, Owners must determine eligibility and complete a certification. The new household must be screened for income, assets, and student status and the existing Income Certification form must be updated. Owners must obtain first hand or third party verification of income and assets.

(i) If the Development becomes aware of the additions to households during the year, this action must be taken at the time the new household member moves in; Owners may not wait until the Annual Eligibility Certification is completed to take action. The Unit Status Report must be updated to reflect current circumstances as the property becomes aware of changes in household size.

(ii) If all original tenants have vacated the unit, the remaining tenants must be certified as a new income-qualified household unless the tenants were income qualified at the time of move in. HTC Units in noncompliance will be reported to the IRS on Form(s) 8823 and/or scored in the Department's Compliance Status System as applicable.

(B) Student status. Developments must use a lease addendum (or incorporate into their lease) a requirement for households to report changes in student status. If at any time the household reports a change in student status or discloses a change on the Annual Eligibility Certification form, the Owner must determine if the household is still eligible under the program. If the household meets one of the exceptions, documentation supporting eligibility must be gathered and retained in the lease file. Units in noncompliance will be reported to the IRS on Form(s) 8823 and/or scored in the Department's Compliance Status System as applicable.

(4) Failure to complete the Annual Eligibility Certification and maintain the form in household files will result in an issue of noncompliance that will be scored as shown in Figure: 10 TAC §60.121(l) under "Failure to maintain or provide Annual Eligibility Certification". No Form(s) 8823 will be filed with the IRS for the noncompliance.

(5) If a 100 percent low income Development continues to complete full recertifications, the Annual Eligibility Certification form must still be completed and the Unit Status Report must be updated at the completion of the recertification. The Department will not review the recertification paperwork during monitoring visits unless noncompliance is identified with the initial certification.

(f) For HOME Investment Partnership Developments, in accordance with 24 CFR §92.252 and §92.203 of the HOME Final Rule, the following recertification requirements apply:

(1) Once every calendar year, the Development must collect a self-certification form from each household that reports the household's income, number and ages of household members, student status, disability status, monthly rental assistance amounts received (if any), and race and ethnicity. The Development must use the Department's Income Certification form to collect this information and must maintain the certification in all household files. Failure to complete the Income Certification and maintain the form in household files will result in an issue of noncompliance that will be scored as shown in Figure: 10 TAC §60.121(l) under "Failure to maintain or provide Annual Eligibility Certification".

(2) HOME Developments must also complete full recertifications of each HOME Unit in every sixth year of the Development's Affordability Period. *Example 111.1:* A HOME property with an affordability period beginning in 2010 must perform full recertifications of all HOME households in 2015. All households must be re-certified, even households that moved in during 2014. Full recertifications at any other time are not required unless, the household self reports an annual income in excess of the 80 percent Area Median Income or as stated in 24 CFR §92.252, there is evidence that the tenant's written statement failed to completely and accurately state information about the family's size or income or the property has otherwise been directed to institute full recertifications by the Department.

§60.112. Requirements Pertaining to Households with Rental Assistance.

(a) The Department will monitor to ensure Development Owners comply with §2306.269 and §2306.6728, Texas Government Code, regarding residents receiving rental assistance under §8, United States Housing Act of 1937 (42 U.S.C. §1437f).

(b) The policies, standards, and sanctions established by this section apply only to:

(1) multifamily housing Developments that receive the following assistance from the Department on or after January 1, 2002 (§2306.185):

(A) a loan or grant in an amount greater than 33 percent of the market value of the Development on the date the recipient took legal possession of the Development; or

(B) a loan guarantee for a loan in an amount greater than 33 percent of the market value of the Development on the date the recipient took legal title to the Development;

(2) multifamily rental housing Developments that applied for and were awarded housing tax credits after 1992;

(3) housing Developments that benefit from the incentive program under §2306.805 of the Texas Government Code;

(4) housing Developments that receive funding from the HOME program (24 CFR §92.252(d)).

(c) Owners of multifamily rental housing Developments described in subsection (a) of this section are prohibited from:

(1) excluding an individual or family from admission to the Development because the individual or family participates in the HOME Tenant Based Rental Assistance Program or the housing choice voucher program under §8, United States Housing Act of 1937 (42 U.S.C. §1437f); and

(2) using a financial or minimum income standard for an individual or family participating in the voucher program that requires the individual or family to have a monthly income of more than 2.5 times the individual's or family's share of the total monthly rent payable to the Owner of the Development. A household participating in the voucher program or receiving any other type of rental assistance may not be required to have a minimum income exceeding $2,500 per year.

(d) To demonstrate compliance with this section, Owners shall:

(1) State in their leasing criteria that the Development will comply with state and federal fair housing and antidiscrimination laws;

(2) Apply screening criteria uniformly, (rental, credit, and/or criminal history) including employment policies, and in a manner consistent with the Texas and Federal Fair Housing Acts, program guidelines, and the Department's rules;

(3) Approve and distribute an Affirmative Marketing Plan that will be used to attract prospective applicants of all minority and non-minority groups in the housing market area regardless of their race, color, religion, sex, national origin, disability, familial status, or religious affiliation. Racial groups to be marketed to may include White, African American, Native American, Alaskan Native, Asian, Native Hawaiians or Other Pacific Islanders. Other groups in the housing market area who may be subject to housing discrimination include, but are not limited to, Hispanic or Latino groups, persons with disabilities, families with children, or persons with different religious affiliations. The Affirmative Marketing plan must be provided to the property management and onsite staff. Owners are encouraged to use HUD Form 935.2A, or successors as applicable. The Affirmative Marketing Plan must identify the following:

(A) Which group(s) the Owner believes are least likely to apply for housing at the Development without special outreach. All Developments must select persons with disabilities as one of the groups identified as least likely to apply. When identifying racial/ethnic minority groups the property will market to, factors such as the characteristics of the housing's market area should be considered. *Example 112.1:* An Owner obtains census data showing that 6.5 percent of the city's total population identify as Asian Americans. However, the Owner's demographic data for the Development shows that zero (0) Asian American households are represented. The Owner chooses to identify Asian American groups as one of the groups least likely to apply at the Development without special outreach.

(B) Procedures that will be used by the Owner to inform and solicit applications from persons who are least likely to apply. Specific media and community contacts that reach those groups designated as least likely to apply must be identified (community outreach contacts may include neighborhood, minority, or women's organizations, grass roots faith-based or community-based organizations, labor unions, employers, public and private agencies, disability advocates, or other groups or individuals well known in the community that connect with the identified group(s)). *Example 112.2:* An Owner has identified the disabled as least likely to apply and has decided to send letters on a quarterly basis to the Case Manager at a non-profit organization coordinating housing for developmentally disabled adults. Additionally, the Owner will advertise upcoming vacancies in a monthly newsletter circulated by an organization serving the hearing impaired.

(C) How the Owner will assess the success of Affirmative Marketing efforts. Affirmative Marketing Plans should be reviewed on an annual basis to determine if changes should be made and plans must be updated every five years to fully capture demographic changes in the housing's market area.

(D) Records of marketing efforts must be maintained for review by the Department during onsite monitoring visits. *Example 112.3:* The Owner keeps copies of all quarterly correspondence mailed to the contacts or community groups identified in the Affirmative Marketing Plan. The letters are dated and addressed and show that the Owner is actively marketing vacancies or a waiting list to the groups identified in the Owner's plan. Failure to maintain a reasonable Affirmative Marketing Plan and documentation of marketing efforts will result in a finding of noncompliance.

§60.116. Property Condition Standards.

(a) All Developments funded by the Department must be decent, safe, sanitary in good repair, and suitable for occupancy throughout the Affordability Period. The Department will use HUD's Uniform Physical Condition Standards (UPCS) to determine compliance with property condition standards. In addition, Developments must comply with all local heath, safety, and building codes. The Department may contract with a third party to complete UPCS inspections.

(b) Housing Tax Credit Development Owners are required by Treasury Regulation 1.42-5 to report (through the Annual Owner's Compliance Report) any local health, safety, or building code violations. HTC Developments that fail to comply with local codes shall be reported to the IRS.

(c) The Department will evaluate UPCS reports in the following manner:

(1) A finding of Major Violations will be cited if:

(A) Life threatening health, safety, or fire safety hazards are reported on the Notification of Exigent and Fire Safety Hazards Observed form and are not corrected within twenty-four (24) hours of the inspection with notification submitted to the Department within seventy-two (72) hours of the inspection. Failure to notify the Department within seventy-two (72) hours of the correction of any exigent health and safety or fire safety hazards listed on the Notification will result in a finding of Major Violations of the Uniform Physical Condition Standards for the Development; or

~~[(B) 20 percent of the violations noted are level three deficiencies other than level three deficiencies reported on the Notification of Exigent and Fire Safety Hazards Observed form and corrected in the seventy-two (72) hour limit; or]~~

(B) ~~[(C)]~~ An ~~[an]~~ overall UPCS score of less than 70 ~~[60]~~ percent (69 ~~[59]~~ percent or below) is reported.

(2) A finding of Pattern of Minor Violations will be assessed if an overall score between 70 percent and 89 percent is reported. ~~[:]~~

~~[(A) 20 percent of the violations noted are level two deficiencies; or]~~

~~[(B) An overall score between 60 percent and 79 percent is reported.]~~

(3) Findings of both Major and Minor Violations will be assessed if deficiencies reported meet the criteria for both.

(d) The Department is required to report to the Internal Revenue Service on Form 8823 any HTC Development that fails to comply with any requirements of the UPCS or local codes at any time (including smoke detectors and blocked egresses). Accordingly, the Department will submit Form(s) 8823 for any UPCS violation. However, if the violation(s) do not meet the conditions described in subsection (c)(1) or (2) of this section, the issue will be noted in the Department's compliance status system as Administrative Reporting and no points will be assigned in the Department's compliance status evaluation of the Development. Non HTC properties that do not meet thresholds for Major and Pattern of Minor Violations as described in subsection (c)(1) or (2) in this section and correct all life threatening health, safety, and fire safety hazards noted at the time of inspection as directed in subsection (c)(1)(A) of this section will not receive findings for UPCS inspections. Items noted that do not exceed thresholds for Major and Pattern of Minor Violations must be corrected by submission of an Owner's Certification of repair within the ninety (90) day corrective action period.

(e) Acceptable evidence of correction of deficiencies is a certification from an appropriate licensed professional that the item now complies with the inspection standard or other documentation that will allow the Department to reasonably determine when the repair was made and whether the repair sufficiently corrected the violation(s) of UPCS standards (examples of such documentation includes work orders, photographs, and/or invoices to third party repair specialists).

(f) The Department will provide a ninety (90) day corrective action period to respond to a notice of noncompliance for violations of the Uniform Physical Condition Standards. The Department will grant up to an additional ninety (90) day extension if there is good cause and the Owner clearly requests an extension during the corrective action period.

(g) 24 CFR §92.251 of the HOME Final Rule requires rental property assisted with HOME funds to be maintained in compliance with all local codes and Housing Quality Standards (24 CFR §982.401). To meet this requirement, all HOME rental Development Owners must annually complete an HQS inspection of all HOME assisted Units. The Department will review HQS inspection sheets for all units for compliance with this requirement during onsite monitoring visits.

(h) Selection of units for inspection:

(1) Vacant units will not be inspected (alternate units will be selected) if a unit has been vacant for fewer than thirty (30) days.

(2) Units vacant for more than thirty (30) days are assumed to be ready for occupancy and will be inspected. No deficiencies will be cited for inspectable items if utilities are turned off and the inspectable item is present and appears to be in working order.

(i) Property damage that is the direct result of utility damage or malfunction or repair activity relating to such damage that is beyond the property owner's control, including, but not limited to, eruption of gas, sewer or storm sewer mains and water mains, and electrical fires, will not be taken into consideration in determining a compliance score, provided that the property owner did not negligently or intentionally serve as a proximate cause for the damage.

§60.117. Notice to Owners.

The Department will provide written notice to the Development Owner if the Department does not receive the AOCR or discovers through audit, inspection, review or any other manner that the Development is not in compliance with the provisions of the deed restrictions, conditions imposed by the Department, or program rules and regulations, including §42 of the IRC. Owners may request that results of monitoring reviews be emailed if all email addresses in CMTS are up to date. If Owners request such notices be sent by email, a paper copy will not be mailed by the Department. The notice will specify a correction period of ninety (90) days from the date of notice to the Development Owner, during which the Development Owner may respond to the Department's findings, bring the Development into compliance, or supply any missing documentation or certifications. The Department may extend the correction period for up to six months from the date of the notice to the Development Owner if there is good cause for granting an extension and the owner requests an extension during the original ninety (90) day corrective action period. If any communication to the Development Owner under this section is returned to the Department as refused, unclaimed or undeliverable, the Development may be considered not in compliance without further notice to the Development Owner. The Development Owner is responsible for providing the Department with current contact information, including address(es) and phone number(s). The Development Owner must also provide current contact information to the Department as required by §1.22 of this title (relating to Providing Current Contact Information to the Department).

§60.118. Special Rules Regarding Rents and Rent Limit Violations.

(a) Rent or Utility Allowance Violations of the maximum allowable limit (HTC). Under the HTC program, the amount of rent paid by the household plus an allowance for utilities, plus any mandatory fees, [~~such as utilities paid to the owner,~~] cannot exceed the maximum applicable limit (as determined by the minimum set aside elected by the Owner) published by the Department. If it is determined that a HTC Development, during the Compliance Period, collected rent in excess of the rent limit established by the minimum set aside, the Department will report the violation as corrected on the date that the rent plus the utility allowance, plus fees, is less than the applicable limit. The refunding of overcharged rent does not avoid the disallowance of the credit by the Internal Revenue Service.

(b) Rent or Utility Allowance Violations of additional rent restrictions (HTC). If the Owner agreed to lease Units at rents less than the maximum allowed under the Code (additional occupancy restrictions), the Department will require the Owner to refund to the affected residents the amount of rent that was overcharged. This applies during the entire Affordability Period. The noncompliance event will be considered corrected on the date which is the later of the date the overcharged rent was refunded/credited to the resident or the date that the rent plus the utility allowance is equal to or less than the applicable limit. *Example 118(1):* For Internal Revenue Code §42 purposes, the maximum allowable limit is 60 percent. However, the Owner agreed to lease some Units to households at the 30 percent income and rent limits. It was discovered that the 30 percent households were overcharged rent. The Owner will be required to reduce the current amount of rent charged and refund the excess rents to the households.

(c) Rent Violations of the maximum allowable limit due to application fees (HTC). Under the HTC program, Owners may not charge tenants any overhead costs as part of the application fee. Owners must only charge the actual cost for application fees as supported by invoices from the screening company the Owner uses. The amount of time Development staff spends on checking an applicant's income, credit history, and landlord references may be included in the Development's application fee. Development Owners may add $5.50 per unit to their other out of pocket costs for processing an application without providing documentation. Should an Owner desire to include a higher amount to cover staff time, wage information and a time study must be supplied to the Department upon request. Documentation of Development costs for application processing or screening fees must be made available during onsite visits or upon request. The Department will review application fee documentation during onsite monitoring visits. If the Department determines from a review of the documentation that the Owner has overcharged residents an application fee, the noncom-

pliance will be reported to the IRS on Form(s) 8823 under the category Gross rent(s) exceeds tax credit limits. The noncompliance will be corrected on the later of January 1st of the next year or as of the date the application fee is reduced and evidence of a reduced application fee is supplied to the Department. Owners are not required to refund the overcharged fee amount. If the Development refunds the overcharged fee in full or in part, the units will remain out of compliance until January 1st of the next year or until the application fee is reduced.

(d) Rent or Utility Allowance Violations on Non Housing Tax Credit properties. If it is determined that the property collected rent in excess of the allowable limit, the Department will require the Owner to refund to the affected residents the amount of rent that was overcharged.

(e) Trust Account to be established. If the Owner is required to refund rent under subsection (b) or (d) of this section and cannot locate the resident, the excess rent collected must be deposited into a trust account for the tenant. The account must remain open for a four (4) year period, until all funds are claimed, or for four (4) years. If funds are not claimed after the four year period, the unclaimed funds must be remitted to the Texas Comptroller of Public Accounts Unclaimed Property Holder Reporting Section to be dispersed as required by Texas unclaimed property statutes.

(f) Rent Adjustments for HOME properties. 24 CFR §92.252 of the HOME Final Rule requires Owners to charge households with an income in excess of 80 percent at recertification, a rent equal to the lesser of 30 percent of the household's adjusted income or the market rent for comparable unassisted Units in the neighborhood. If at recertification the household self certifies an income in excess of the 80 percent limit, documentation of all income, assets and allowable deductions must be obtained by the owner. The Department will find a HOME property in noncompliance with this section if the Owner fails to determine the over income household's adjusted income and maintain documentation of market rents for comparable unassisted Units in the neighborhood.

(g) Special conditions for CDBG properties. To determine if a Unit is rent restricted, the amount of rent paid by the household, plus an allowance for utilities, plus any rental assistance payment must be less than the applicable limit.

§60.120. Monitoring Procedures for Housing Tax Credit Properties After the Compliance Period.

(a) Housing Tax Credit properties allocated credit in 1990 and after are required under the Code (§42(h)(6)) to record a LURA restricting the property for at least thirty (30) years. Various sections of the Code specify monitoring rules State Housing Finance Agencies must implement during the Compliance Period.

(b) After the Compliance Period, the Department will continue to monitor Housing Tax Credit Developments using the rules detailed in paragraphs (1) - (12) of this subsection.

(1) On site monitoring visits will continue to be conducted approximately every three years, unless the Department determines that a more frequent schedule is necessary;

(2) In general, the Department will review 10 percent of the low income files. No less than 5 files and no more than 20 files will be reviewed;

(3) The exterior of the property, all building systems and 10 [~~20~~] percent but no more than 35 of the Development's Low Income Units will be physically inspected to determine compliance with HUD's Uniform Physical Condition Standards;

(4) Each Development shall submit an annual report in the format prescribed by the Department;

(5) Reports to the Department must be submitted electronically as required in §60.105 of this chapter;

(6) Compliance monitoring fees will continue to be submitted to the Department annually in the amount stated in the LURA;

(7) All households must be income qualified upon initial occupancy of any Low Income Unit. Proper verifications of income are required, and the Department's Income Certification form must be completed unless the Development participates in the Rural Rental Housing Program or a project based HUD program;

(8) Rents will remain restricted for all Low Income Units. After the Compliance Period, utilities paid to the owner can be accounted for in the utility allowance. The tenant paid portion of the rent plus the applicable utility allowance must not exceed the applicable limit;

(9) All additional income and rent restrictions defined in the LURA remain in effect;

(10) Other requirements defined in the LURA, such as the provision of social services or serving special needs households, will remain in effect;

(11) The Owner shall not terminate the lease or evict low income residents for other than good cause; and

(12) The total number of required Low Income Units must be maintained Development wide.

(c) After the first fifteen (15) years of the Extended Use Period, certain requirements will not be monitored as detailed in paragraphs (1) - (4) [~~(3)~~] of this subsection.

(1) The student restrictions found in §42(i)(3)(D) of the Code. An income qualified household consisting entirely of full time students may occupy a Low Income Unit;

(2) The building applicable fraction found in the Development's Cost Certification and/or the LURA. Low income occupancy requirements will be monitored Development wide, not building by building; [~~and~~]

(3) Household transfers between buildings restricted by §42(g)(1). All households, regardless of HTC income level designation, will be allowed to transfer between buildings with the Development; and [~~.~~]

(4) The Department will not monitor the Development's application fee after the Compliance Period is over.

(d) Unless specifically noted in this section, all requirements of this chapter and §42 of the Internal Revenue Code remain in effect for the Extended Use Period. These Post Year 15 Monitoring Rules apply only to the Housing Tax Credit Developments administered by the Department. Participation in other programs administered by the Department may require additional monitoring to ensure compliance with the requirements of those programs.

§60.121. Material Noncompliance Methodology.

(a) The Department maintains a compliance history of each monitored Development in the Department's Compliance Status System. Developments with more than one program administered by the Department are scored by program. The Development will be considered in Material Noncompliance if the score for any single program exceeds the Material Noncompliance threshold [~~noncompliance limit~~] for that program.

(b) A Development will not be assigned the scores noted in this section until after the Owner has been provided a written notice of the noncompliance and provided a corrective action deadline to show that either the Development was never in noncompliance or that the noncompliance event has been corrected.

(c) This section identifies all possible noncompliance events for all programs monitored by the Physical Inspection and Compliance Monitoring Sections of the Compliance and Asset Oversight Division [~~Department~~]. However, not all issues listed in this section pertain to all Developments. In addition, only certain noncompliance events are reportable on Form 8823. Those events that are reportable under the HTC program on Form 8823 are so indicated in subsections (k) and (j) of this section.

(d) For HTC Developments, all Forms 8823 issued by the Department will be entered into the Department's Compliance Status System. However, Forms 8823 issued prior to January 1, 1998 will not be considered in determining Material Noncompliance.

(e) For all programs, a Development will be in Material Noncompliance if the noncompliance event is stated in this section to be Material Noncompliance. The Department may take into consideration the representations of the Applicant regarding monitoring notices and owner responses [~~noncompliance events~~]; however, unless an owner can prove otherwise, the compliance records of the Department shall be presumed to be correct.

(f) All Developments, regardless of status, that are or have been administered, funded, or monitored by the Department are scored even if the Development no longer actively participates in the program, with the exception of properties in the FDIC's Affordable Housing Disposition Program.

(g) A Development's score will be reduced by the number of points needed to be one point under the Material Noncompliance threshold provided that all issues of noncompliance are corrected and the owner has a pattern of timely responding within the correction period to Department requests for corrective action. However, prior to a reduction in score, HOME or HTF funded properties will have their LURA extended to ensure the full affordability period will be achieved. If the Development owner does not agree to this, then the score will not be reduced. Forms 8823 will be sent to the IRS for HTC properties, as appropriate, regardless of score.[~~:~~]

[~~(1) The Development has no previously reported noncompliance events that are uncorrected,~~]

[~~(2) All newly identified noncompliance events are corrected during the corrective action period,~~]

[~~(3) All corrective action documentation for the newly identified noncompliance is provided to the Department during the corrective action period, and~~]

[~~(4) The Development was not already in Material Noncompliance at the time of its most recent monitoring review.~~]

(h) Noncompliance events are categorized as either "Development events" or "Unit/building events." Development events of noncompliance affect some or all the buildings in the Development; however, the Development will receive only one score for the noncompliance event rather than a score for each building. Other noncompliance events are identified individually by Unit and will receive the appropriate score for each Unit cited with an event. The Unit scores and the Development scores accumulate towards the total score of the Development. Violations under the HTC program are identified by Unit; however, the building is scored rather than the Unit and the building will receive the noncompliance score if one or more of the Units are in noncompliance.

(i) Uncorrected noncompliance events, if applicable to the Development, will carry the maximum number of points until the noncompliance event has been reported corrected by the Department. Once reported corrected by the Department, the score will be reduced to the "corrected value." Corrected noncompliance will no longer be included in the Development score three years after the date the noncompliance was reported corrected by the Department.

(j) Each noncompliance event is assigned a point value. The possible events of noncompliance and associated "corrected" and "uncorrected" points are listed in subsection (k) of this section.

(k) Figure: 10 TAC §60.121(k) lists events of noncompliance that affect the entire Development rather than an individual Unit. The first column of the chart identifies the noncompliance event. The second column identifies the number of points assigned this event while the issue is uncorrected. Material Noncompliance for a HTC Development is 30 points. Material Noncompliance for a non HTC property with 1 to 50 low income units is 30 points. Material Noncompliance for a non HTC property with 51 to 200 Low Income Units is 50 points. Material Noncompliance for non HTC properties with 201 or more Low Income Units is 80 points. The third column lists the number of points assigned to this event when the issue is corrected until three years after correction. The fourth column indicates what programs the noncompliance event applies to. The last column indicates if the issue is reportable on Form 8823 for HTC Developments.
Figure: 10 TAC §60.121(k)

(l) Figure: 10 TAC §60.121(l) lists 10 events of noncompliance associated with individual Units. The first column of the chart identifies the noncompliance event. The second column identifies the number of points assigned this event while the issue is uncorrected. Material Noncompliance for a HTC property is 30 points. Material Noncompliance for a non HTC property with 1 to 50 low income units is 30 points. Material Noncompliance for a non HTC property with 51 to 200 Low Income Units is 50 points. Material Noncompliance for non HTC properties with 201 or more Low Income Units is 80 points. The third column lists the number of points assigned this event when the issue is corrected until three years after the event is corrected. The fourth column indicates what programs the noncompliance event applies to. The last column indicates if the issue is reportable on Form 8823 for HTC Developments.
Figure: 10 TAC §60.121(l) (No change.)

§60.122. Previous Participation Reviews.

(a) Prior to providing any Department assistance, executing a Carryover Allocation Agreement, approving a transfer in ownership, or processing a request for a Qualified Contract, the [~~Portfolio Management and~~] Compliance and Asset Oversight Division will conduct a previous participation review to determine if the requesting entity controls a rental development that is in Material Noncompliance, owes the Department any fees, is sixty (60) days delinquent on a loan payment, has a past due single audit or single audit certification form, or has any unresolved [~~outstanding~~] audit or monitoring findings identified by the Contract Monitoring Section of the Compliance and Asset Oversight Division [~~issues or any uncorrected issues of noncompliance~~]. Previous participation reviews will also be conducted if more than one hundred-twenty (120) days elapse between Board approval of an Application and a loan closing. Assistance includes but is not limited to allocating any Department funds or tax credits, with the exception of Community Services Block Grant funds, permitting the transfer of Ownership of a property, engaging in loan or contract modifications that result in increased funding, and providing incentive awards.

(b) HTC Developments with any uncorrected issues of noncompliance or with pending notices of noncompliance, will not be issued Form 8609s, Low Income Housing Credit Allocation Certification, until the noncompliance is corrected.

(c) If during the previous participation review an uncorrected issue of noncompliance required by the HOME final Rule is identified on a HOME Development monitored by the Department, the entity requesting assistance will be notified of the issue and provided [~~a~~] five (5) business days [~~day period~~] to submit all necessary corrective action to cure the violation(s). The notification will be in writing and may be delivered by email. If the requesting entity does not cure the violation(s) [~~issues~~], the Application for assistance will be terminated. If the Application is terminated, the Board [~~applicant~~] has the ability to reinstate the Application for consideration [~~appeal~~] as provided in §60.126(a) [~~1.7~~] of this chapter [~~title~~].

(d) If during the previous participation review, the Department determines that the requesting entity owes the Department any fees, is sixty (60) days delinquent on a loan payment, has a past due audit or audit certification form, has unresolved audit or monitoring findings identified by the Contract Monitoring section of the Compliance and Asset Oversight division, or has control of an existing Development monitored by the Department that is in Material Noncompliance, the entity requesting assistance will be provided five (5) business days to submit all necessary corrective action, fees, bring their loan current, single audit or audit certification to cure the violation(s). If the requesting entity does not cure the issue(s), the Application for assistance will be terminated. If the Application is terminated due to Material Noncompliance, the Board has the ability to reinstate the application for consideration as provided in §60.126(b) of this chapter.

(e) If during the previous participation review, the Department determines that the requesting entity is on the Department's or the Department of Housing Urban Development's debarred list, the Application for assistance will be terminated. An application properly terminated for this reason cannot be reinstated for consideration.

[~~(f) In accordance with §2306.057 of the Texas Government Code, the Board shall fully document and disclose any instances in which the Board approves a project Application despite any noncompliance associated with the project, applicant, or affiliate. If an Application is terminated because of the Previous Participation Review, the applicant may appeal the decision in accordance with §1.7 or §1.8 of this title.~~]

(f) [~~(g)~~] Treatment of previously owned Developments during a Previous Participation review:

(1) The Department will not take into consideration the score of a Development transferred by the applicant over three (3) years ago.

(2) The Department will not take into consideration the score of a Development whose Affordability Period ended over three years ago.

(3) The Department will not take into consideration scores attributed to Developments for noncompliance with FDIC's Affordable Housing Disposition Program.

(4) If the Development was transferred less than three (3) years ago, the Department will determine the score for the noncompliance events with a date of noncompliance identified during the applicant's period of Ownership. If the points associated with the noncompliance events identified during the applicant's period of Ownership exceed the threshold for Material Noncompliance, the Application will not be recommended.

(g) [~~(h)~~] Date for determining [~~of~~] Material Noncompliance. Previous participation reviews will be conducted prior to the Board meeting when funds will be awarded. The score is effect at the completion of the previous participation review process (which includes the five (5) day period referenced in subsection (d) of this section) will be used to determine if the Application for assistance will be terminated. Previous participation reviews are not required to be performed if less than one hundred-twenty (120) days have elapsed since the last review, provided there is no change in the organizational structure. [~~For HTC Applications, the score in effect on May 1st of the year the HTC Application is submitted will be used. For Carryover Allocations, the score in effect on October 1st of the year the award is being made will be used. For all other requests for assistance, the score in effect the day of Previous Participation Review is being conducted will be used.~~]

(h) Treatment of units of government during a previous participation review. If a city, county or local government applies for assistance from the Department a previous participation review will be conducted. If the city, county or unit of government controls a rental property that is in Material Noncompliance, owes the department any fees, is sixty (60) days delinquent on a loan payment, has a past due audit or audit certification form or has unresolved audit or monitoring findings from a department or other review, the process described in subsection (d) of this section will be followed. However, the previous participation of individual elected officials will not be considered provided that they are not the contract executor for the Application being considered for funding.

(i) Treatment of nonprofits during a previous participation review. If a nonprofit applies or is associated with an Application for assistance from the Department a previous participation review will be conducted. If the nonprofit controls a rental property that is in Material Noncompliance, owes the Department any fees, is sixty (60) days delinquent on a loan payment, has a past due audit or audit certification form or has unresolved audit or monitoring findings identified by the Contract Monitoring section of the Compliance and Asset Oversight division, the process described in subsection (d) of this section will be followed. If it is determined that the Executive Director, Chair of the Audit Committee, Board Chair or any member of the Executive Committee of the nonprofit controls a rental property that is in Material Noncompliance, owes the Department any fees, is sixty (60) days delinquent on a loan payment, has a past due audit or audit certification form or has unresolved audit or monitoring findings identified by the Contract Monitoring Section of the Compliance and Asset Oversight division, the process described in subsection (d) of this section will be followed. If within the five (5) day period, the party with noncompliance resigns from the Board or organization requesting assistance, the noncompliance will not be taken into consideration. If it is determined that any member of the Board of the Nonprofit is on the Department's or the Department of Housing Urban Development's debarred list, the Application for assistance will be terminated.

§60.123. Alternative Dispute Resolution (ADR).

(a) It is the Department's policy to encourage the use of appropriate alternative dispute resolution procedures (ADR) to assist in resolving disputes under the Department's jurisdiction. If at any time an applicant or other person would like to engage the Department in an ADR process, the person may send a proposal to the Department's Dispute Resolution Coordinator. For additional information on the Department's ADR Policy, see the Department's General Administrative Rule on ADR at §1.17 of this title.

(b) In all phases of monitoring, (construction and throughout the entire Affordability Period) if a potential issue of noncompliance has been identified, Owners will be provided a written notice of noncompliance. In general, the [~~The~~] Department will provide up to a

ninety (90) day corrective action period which can and will be extended for an additional ninety (90) days if there is good cause and the Owner requests an extension during the corrective action period.

(c) Owners must respond to the Department's notice of noncompliance. If an Owner does not respond, this ADR process which is explained in this section cannot be initiated.

(d) If an Owner does not agree with the Department's assessment of compliance, they should clearly explain their position and provide as much supporting documentation as possible. If the position is reasonable and well supported, the issue of noncompliance will be cleared with no further action taken, i.e. for HTC properties, Form(s) 8823 will not be filed with the Internal Revenue Service and the issue will not be scored in the Department's compliance status system.

(e) If an Owner's response indicates disagreement with the Department's assessment of noncompliance, but does not appear to be a valid concern to the Department, staff will notify the Owner in writing of their right to engage in ADR. The Owner must respond in five (5) days and request ADR. In addition, the owner must request an extension of the corrective action deadline, if one is still available. If the owner does not respond to the staff's invitation to engage in ADR, the Department's assessment of the violation is final.

(f) The Department must meet the Treasury Regulation requirement found in §1.42-5 and file Form 8823 within forty-five (45) days after the end of the corrective action period. Therefore, it is possible that the Owner and Department may still be engaged in ADR. In this circumstance, the Form 8823 will be filed. However, it will be sent to the IRS with an explanation that the owner disagrees with the Department's assessment and is pursuing ADR. All Owner supplied documentation supporting their position will be supplied to the IRS. Although the violation will be reported to the IRS within the required timeframes, it will not be scored in the Department's compliance status system pending outcome of ADR.

(g) ADR is not an appropriate format for matters regarding interpretations of laws, regulations and rules. ADR can only be used when parties could reach consensus.

§60.126. Temporary Suspension of Previous Participation Reviews [~~Waiver~~].

[~~The Board, in its discretion and within the limits of law may waive any one or more of these Rules if the Board finds that a waiver is appropriate to fulfill the purposes or policies of Chapter 2306, Texas Government Code, or for other good cause, as determined by the Board.~~]

(a) An entity whose request for assistance is terminated under §60.122 of this chapter may request reinstatement of the Application for consideration. The request must be in writing and must be submitted to the Department within three (3) days of the date of the Department's letter notifying the requesting entity of the termination/denial. A timely filed request for reinstatement shall be placed on the agenda for the next Board meeting for which it can be properly posted.

(b) If an Application for assistance was terminated under §60.122 of this chapter, the Board may consider reinstatement of the application only in the event that it determines, after consideration of the relevant, material facts and circumstances that:

(1) it is in the best interests of the Department and the State to proceed with the award;

(2) the award will not present undue increased program or financial risk to the Department or State;

(3) the applicant is not acting in bad faith; and

(4) the applicant has taken reasonable measures within its power to remedy the cause for the termination.

(c) Reinstatement of a terminated Application merely makes the Application eligible to be considered and does not, in and of itself, constitute approval.

§60.127. Temporary Suspension of other Sections of this Subchapter.

(a) Temporary Suspensions of other sections of this subchapter may be granted if the Board finds one or more of the following factors:

(1) A natural disaster or other act of God has made the application of this subchapter infeasible for a period of time and the Governor of Texas or President of the Untied States has previously made a disaster declaration in the area during the relevant time period;

(2) Due to documented shortages in items necessary to complete the requirements of the subchapter, the owner/applicant was unable to meet the subchapter requirements, this would include but not be limited to a shortage of labor, building materials, or public utilities available;

(3) A federal rule has changed that significantly changed the ability of the owner/applicant to deliver the services required at the time the property was placed in service or began operation--note that the Board cannot waive the rule itself and the owner must comply, but the Board may suspend the compliance score related to the violation in this situation; and/or

(4) When a property has been subjected in part to a governmental action such as partial condemnation through no fault of the owner/applicant, eminent domain, or zoning changes that do not allow corrections required.

(b) Under no circumstances can the Board suspend for any period of time compliance with the HOME Final Rule or regulations issued by HUD when required by federal law.

(c) Under no circumstances can the Board suspend for any period of time treasury regulations, IRS publications controlling the submission of Form 8823, or any sections of 26 U.S.C. §42.

(d) Examples of items the Board could temporarily suspend include: the requirement to report online, requirement to use Department approved forms, sampling size requirements for agency calculated utility allowance, or the requirement to repay overcharged rent on a HTF property.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 11, 2009.

TRD-200904001
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 475-3916

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 1. AGENCY ADMINISTRATION
SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §1.16

The Texas Higher Education Coordinating Board proposes amendments to §1.16, concerning Contracts for Materials and Services. Specifically, these amendments will authorize an assigned committee to approve a request for the purchase of materials or services, including grants, if the cost for those materials or services is greater than $100,000.00 but less than or equal to $750,000.00. It eliminates the current requirement to have a second committee also approve the request.

William M. Franz, General Counsel, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rule.

Mr. Franz has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be enhanced agency efficiency. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to William M. Franz, P.O. Box 12788, Austin, Texas 78711-2788, william.franz@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, §61.027, which provides the Coordinating Board with rulemaking authority to effectuate the provisions of Chapter 61.

The amendments affect Texas Education Code, §61.026.

§1.16. Contracts for Materials and Services.

(a) (No change.)

(b) The Board committee to which an item is assigned [~~Agency Operations Committee~~] shall approve all requests for the purchase of materials or services if the cost for those materials or services is greater than $100,000.00 but less than or equal to $750,000.00. After a vendor is selected, the Chair and Vice Chair of the Board shall provide final approval of the contract with the selected vendor.

(c) (No change.)

(d) The Commissioner shall provide a report to the Board [~~Agency Operations Committee~~], at least quarterly, describing all contracts for the purchase of materials or services.

(e) (No change.)

(f) In the event that the agency is required by statute to enter into a contract for the purchase of materials or services with a value of over $100,000, including the awarding of grants, approval of such a request or contract by the Board or a Board committee [~~the Agency Operations Committee~~] pursuant to subsection (a) or (b) of this section, as appropriate, shall not be required when such an award involves no discretion by the Board or agency staff. The Commissioner shall approve such contracts and report them to the Board at the next quarterly Board meeting following the approval.

(g) In the event that a contract for a given amount has been approved by either the Board or a Board committee [~~the Agency Operations Committee~~], as applicable, and circumstances alter such that the expenditure necessary under the contract increases by not more than ten per cent, the Commissioner or the Deputy Commissioner for Business and Finance/Chief Operating Officer may approve such an increase. Should the increase in expenditure exceed ten per cent, the contract must be resubmitted for approval by the Board or a Board committee [~~Agency Operations Committee~~], as appropriate.

(h) In the event that the Board or a Board committee [~~the Agency Operations Committee~~], as applicable, has approved the issuance of a request for the purchase of materials or services that will result in the letting of contracts, including grants, to multiple vendors or providers of services, any resulting contract which by itself shall have a cost greater than $100,000 must be approved by the Chair and Vice Chair of the Board. The Commissioner or the Deputy Commissioner for Business and Finance/Chief Operating Officer, in accordance with subsection (c) of this section, shall provide final approval of contracts with the selected vendors or providers of services if the contract amount is less than or equal to $100,000.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 11, 2009.

TRD-200904007
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 29, 2009
For further information, please call: (512) 427-6114

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CHAPTER 5. RULES APPLYING TO PUBLIC UNIVERSITIES AND HEALTH-RELATED INSTITUTIONS OF HIGHER EDUCATION IN TEXAS
SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §5.5

The Texas Higher Education Coordinating Board proposes amendments to §5.5, concerning the Uniform Admissions Policy. Specifically, these amendments will implement requirements under House Bill 3826 (80th Texas Legislature) that amend specific provisions for students admitted to public universities under the top 10 percent rule requiring the completion of the Recommended or Advanced High School Program, or an equivalent curriculum, or achievement of ACT's College Readiness Benchmarks on the ACT assessment or a score of at least 1500 out of 2400 for the SAT assessment. In addition, these amendments will provide for the admission to any public institution of higher education children of certain public servants killed in the line of duty.

Dr. Judith Loredo, Assistant Commissioner, P-16 Initiatives, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rule.

Dr. Loredo has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering this section will be a greater assurance that Texas public institutions of higher education will implement

new requirements for the top 10 percent rule for graduates of Texas public and private high schools and new requirements for admission of children of certain public servants killed in the line of duty. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lynette Heckmann, Director, College Readiness Initiatives, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711, or lynette.heckmann@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under Texas Education Code, §§51.803, 51.804, 51.805, and 51.807, which provides the Coordinating Board with the authority to adopt rules relating to the operation of admissions programs under these sections, including rules relating to the identification of eligible students, and to adopting rules to establish standards for determining whether a private high school is accredited and whether a student completing a high school curriculum meets the requirements of Texas Education Code, §28.025, or its equivalent.

The amendments affect Texas Education Code, §§28.025, 51.803, 51.804, 51.805, and 51.807.

§5.5. Uniform Admission Policy.

(a) Each public university shall admit first-time undergraduate students for each semester in accordance with Texas Education Code, §§51.801 - 51.809. Only The University of Texas at Austin shall admit students under Texas Education Code, [§]§51.803(a-1) - (a-5) and subsection (e) [~~(d)~~] of this section.

(b) All applicants from Texas schools accredited by a generally recognized accrediting agency and who graduate in the top 10 percent of their high school class shall be admitted to a general academic teaching institution if the student meets the following conditions:

(1) The student graduated from high school within the two years prior to the academic year for which the student is applying for admission[~~, and~~];

(2) The student has met one of the following:

(A) Successfully completed the Recommended or Advanced High School Program from a Texas public high school as outlined under Texas Education Code, §28.025;

(B) Successfully completed a curriculum from a high school in Texas other than a public high school that is equivalent in content and rigor to the Recommended or Advanced High School Program as outlined under subsection (c) of this section;

(C) Satisfied ACT's College Readiness Benchmarks on the ACT assessment; or

(D) Earned on the SAT assessment a score of at least a 1500 out of 2400, or the equivalent;

(3) [~~(2)~~] The student submitted a complete application as defined by the institution before the expiration of the institution's established deadline; and[~~.~~]

(4) The student submitted an official high school transcript or diploma not later than the end of the student's junior year of high school. The transcript or diploma must indicate that the student satisfied the requirements outlined under paragraph (2)(A) or (B) of this subsection.

(c) A student is considered to have satisfied the requirements of subsection (b)(2)(A) or (B) of this section if the student completed all or the portion of the Recommended or Advanced High School Program or of a curriculum equivalent in content and rigor, as applicable, that was available to the student. Student's may be considered to have completed the Recommended or Advanced High School curriculum if a student was unable to complete the remainder of the curriculum solely because courses necessary to complete the remainder were unavailable to the student at the appropriate times in the student's high school career as a result of course scheduling, lack of enrollment capacity, or another cause not within the student's control. The standards for determining whether a student has satisfied the requirements of this subsection include the following:

(1) For a student in a Texas public high school, the public high school providing to a Texas public institution of higher education the transcript or diploma outlined under subsection (b)(4) of this section must indicate, in a form and manner prescribed by the Commissioner of Higher Education, whether the student has completed all or a portion of the Recommended or Advanced High School Program or of the curriculum equivalent in content and rigor, as applicable, that was available.

(2) For a student in a Texas private high school, the private high school providing to a Texas public institution of higher education the transcript or diploma outlined under subsection (b)(4) of this section must:

(A) Be accredited by the Texas Private School Accreditation Commission or other accrediting organizations recognized by the Texas Education Agency; and

(B) Indicate, in a form and manner prescribed by the Commissioner of Higher Education, whether the student has completed all or a portion of the Recommended or Advanced High School Program or of the curriculum equivalent in content and rigor, as applicable, that was available.

(d) [~~(c)~~] All applicants from high schools operated by the United States Department of Defense and who graduate in the top 10 percent of their high school class shall be admitted to a general academic teaching institution if the student meets the following conditions:

(1) The student graduated from high school within the two years prior to the academic year for which the student is applying;

(2) The student is a Texas resident as defined in Texas Education Code, §54.052 or is entitled to pay tuition and fees at the rate provided for Texas residents for the term or semester to which the student is admitted; and

(3) The student submitted a complete application as defined by the institution before the expiration of the institution's established deadline.

(e) [~~(d)~~] For the period from the 2011-2012 academic year through the 2015-2016 academic year, The University of Texas at Austin is not required to admit applicants in excess of the number needed to fill 75 percent of first-time resident undergraduate students.

(f) [~~(e)~~] High school rank for students seeking automatic admission to a general academic teaching institution on the basis of their class rank is determined and reported as follows:

(1) Class rank shall be based on the end of the 11th grade, middle of the 12th grade, or at high school graduation, whichever is most recent at the application deadline.

(2) The top 10 percent of a high school class shall not contain more than 10 percent of the total class size.

(3) The student's rank shall be reported by the applicant's high school or school district as a specific number out of a specific number total class size.

(4) Class rank shall be determined by the school or school district from which the student graduated or is expected to graduate.

(g) [~~(f)~~] A general academic teaching institution may limit the number of students admitted under this section if the number of applicants eligible and applying for admission to the institution under this section exceeds by more than 10 percent the average number of first-time freshmen admitted the previous two academic years. If an institution chooses to limit the number of students admitted under this section, it must ensure that:

(1) At least 97 percent of first-time freshmen admitted are in the top 10 percent of their high school class; and[~~:~~]

(2) Clear guidelines are established for the selection of students based on one or a specified combination of the following methods:

(A) A lottery in which all students qualified for automatic admission have an equal chance for selection;

(B) Students are selected on a first-come, first-admitted basis following receipt of a complete application; or

(C) At least four or more criteria identified in Texas Education Code, §51.805 are used to select students admitted.

(h) [~~(g)~~] Each general academic teaching institution shall annually report to the Board the composition of the entering class of first-time freshmen students admitted under this section. The report shall include a demographic breakdown of the class including race, ethnicity, and economic status. Each general academic teaching institution shall provide this report to the Board annually on or before a date set by the Board.

(i) Each public institution of higher education shall admit a student as an undergraduate if the student meets the following conditions:

(1) Is the child of a public servant listed in Texas Government Code, §615.003 who was killed or sustained a fatal injury in the line of duty; and

(2) Meets the minimum admissions requirements established for purposes of this subsection by the governing board of the institution for high school or prior college-level grade point average and performance on standardized tests.

~~[(h) In exercising its discretion in accordance with Texas Education Code, §51.804, whether to adopt an admissions policy for each academic year for first time freshman students, the governing board of each general academic teaching institution may elect to admit students who do not meet the requirements of Texas Education Code, §51.803, but who qualify for admission under one or more of the factors listed in Texas Education Code, §51.805(b). However, the total number of such students who are admitted in an academic year may not exceed 20% of the total number of first-time freshman students admitted by the institution for that academic year. This subsection expires August 31, 2009.]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 10, 2009.

TRD-200903983
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: October 29, 2009
For further information, please call: (512) 427-6114

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TITLE 22. EXAMINING BOARDS

PART 18. TEXAS STATE BOARD OF PODIATRIC MEDICAL EXAMINERS

CHAPTER 375. CONDUCT AND SCOPE OF PRACTICE

22 TAC §375.1

The Texas State Board of Podiatric Medical Examiners proposes amendments to §375.1, concerning Definitions. The changes to §375.1 are being proposed to remove the definition of foot which is currently found in paragraph (2). The Board has determined that the practice of podiatry can be addressed by other sections of the rules, including §375.3, without the need for the Board to define the term "foot" at this time. The changes to §375.1 are also proposed to add a clarification to the term "condition" which is referenced in proposed amendments to §375.3.

Hemant Makan, Executive Director, has determined that for the first five year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Makan has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of adopting the changes for §375.1 will be a better understanding of the practice of podiatry and its scope, including its limitations. There will be no cost to small businesses, micro-businesses or individuals.

Comments on or about the proposed amendments may be submitted, in writing, within 30 days after this notice is published in the *Texas Register* to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, janie.alonzo@foot.state.tx.us.

The amendments are proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the laws of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcements of the law regulating the practice of podiatry.

The proposed amendments to §375.1 implement Texas Occupations Code §202.001(a)(4).

§375.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context indicates otherwise:

(1) (No change.)

(2) *Condition*--Any disease, disorder, physical injury, deformity or ailment of the human foot.

~~[(2) *Foot*--The foot is the tibia and fibula in their articulation with the talus, and all bones to the toes, inclusive of all soft tissues (muscles, nerves, vascular structures, tendons, ligaments and any other anatomical structures) that insert into the tibia and fibula in their articulation with the talus and all bones to the toes.]~~

(3) *Medical Records*--Any records, reports, notes, charts, x-rays, or statements pertaining to the history, diagnosis, evaluation, treatment or prognosis of the patient including copies [~~copes~~] of medical records of other health care practitioners contained in the records of the podiatric physician to whom a request for release of records has been made.

(4) - (6) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 10, 2009.

TRD-200903973
Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 305-7000

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22 TAC §375.3

The Texas State Board of Podiatric Medical Examiners proposes amendments to §375.3, concerning General. The changes to §375.3 are being proposed to address the practice of podiatry and to clarify its scope, including its limitations.

Hemant Makan, Executive Director, has determined that for the first five year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Makan has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of adopting the amendments to §375.3 will be to address the practice of podiatry and to clarify its scope, including its limitations. There will be no cost to small businesses, micro-businesses or individuals.

Comments on or about the proposed amendments may be submitted, in writing, within 30 days after this notice is published in the *Texas Register* to Janie Alonzo, Staff Services Officer V, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, janie.alonzo@foot.state.tx.us.

The amendments are proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the laws of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcements of the law regulating the practice of podiatry.

The proposed amendments to §375.3 implement Texas Occupations Code §202.001(a)(4); and Texas Health and Safety Code §241.101 and §241.102.

§375.3. General.

(a) - (b) (No change.)

(c) A licensed podiatric physician may treat conditions of that portion of the body at or below the ankle by any system or method.

(d) The intent of subsection (c) of this section is to clarify that treatment may also include procedures performed on soft tissue structures distal to the tibial tuberosity that treat conditions on that portion of the body at or below the ankle.

(e) Complex surgical procedures of the ankle by a podiatric physician shall be performed only in a JCAHO (Joint Commission on the Accreditation of Healthcare Organizations) approved hospital or a licensed ambulatory surgical center.

(f) The Texas State Board Podiatric Medical Examiners recommends individual privileging based on an individual practitioner's level of documented experience, documented training or board certification/board eligibility.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Janie Alonzo
Staff Services Officer V
Texas State Board of Podiatric Medical Examiners
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 305-7000

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

The Texas Department of Insurance proposes amendments to §§3.6101, 3.6102, 3.7001 - 3.7003, and 3.7006, concerning the minimum reserve requirements for credit life and credit accident and health insurance. The proposed amendments are necessary to implement House Bill (HB) 1761, 81st Legislature, Regular Session, effective June 19, 2009, which amended the Insurance Code §425.058(l), relating to the minimum reserve requirements for credit life and credit accident and health insurance. In accordance with §425.058(l), the proposed amendments: (i) establish the minimum reserve requirements for credit life insurance policies and certificates issued on or after January 1, 2009, based, in part, on the 2001 CSO Male Composite Ultimate Mortality Table for male and female insureds; (ii) establish the minimum reserve requirements for single premium credit accident and health insurance policies and certificates issued on or after January 1, 2009, based, in part, on the 1985 Commissioners Individual Disability Table A (85CIDA); and (iii) enumerate the additional reserve requirements for all credit insurance contracts

in the aggregate if the contract reserve is less than the net premium refund liability. The proposed amendments also are necessary to: (i) clarify the minimum reserve standards for credit life insurance policies and single premium credit accident and health insurance policies issued before January 1, 2009, and for all non-single premium credit accident and health policies; (ii) delete subsection (c) in §3.6102 because it is obsolete as the result of the adoption of more current actuarial opinion requirements in other Department rules; (iii) update statutory citations in existing rules to conform to the non-substantive revision of the Insurance Code; and (iv) correct citation style errors.

The following is a discussion of each of the proposed amendments.

Policy Reserves for Credit Life Insurance Contracts. The proposed amendments to §3.6101(a) are necessary to clarify that the minimum policy reserve requirements in existing §3.6101(a) continue to apply to credit life insurance contracts issued prior to January 1, 2009. The proposed amendments to §3.6101(a) are also necessary to clarify that Subchapter EE of Chapter 3 does not apply to credit life insurance. Additionally, the proposed amendments to §3.6101(a) are necessary to implement §425.058(l)(4) of the Insurance Code, which prescribes the policy reserve requirements related to net refund liability for all credit insurance contracts. In accordance with §425.058(l)(4), the proposed amendments to §3.6101(a) delete the outdated net refund liability requirements in existing §3.6101(a) and replace them with the new net refund liability requirements in proposed new §3.6101(c). The proposed amendments to §3.6101(a) to add paragraphs (1) - (4) are necessary to implement the Insurance Code §425.058(l)(2). Pursuant to §425.058(l)(2), the Commissioner is statutorily required to adopt minimum reserve standards which include mortality based on either the 2001 CSO Male Composite Ultimate Mortality Table for male and female insureds, or another CSO Mortality Table approved by the National Association of Insurance Commissioners (NAIC) on or after January 1, 2009, for use on credit life policy reserves. Because the NAIC has only approved the 2001 CSO Male Composite Ultimate Mortality Table and has not approved another CSO Mortality Table on or after January 1, 2009, for use on credit life policy reserves, the Commissioner is required under §425.058(l)(2) to adopt rules that include mortality based on the 2001 CSO Male Composite Ultimate Mortality Table for male and female insureds. Therefore, in accordance with §425.058(l)(2)(A) of the Insurance Code, proposed new §3.6101(a)(1) establishes the 2001 CSO Male Composite Ultimate Mortality Table as the appropriate mortality table to use in determining the minimum standard valuation of reserves for credit life policies and certificates issued on or after January 1, 2009, for both male and female insureds. Also in accordance with §425.058(l)(2)(A), proposed new §3.6101(a)(2) establishes that where the credit life insurance policy or certificate insures two lives, the minimum standard shall be twice the mortality in the 2001 CSO Male Composite Ultimate Mortality Table based on the age of the older insured. The 2001 CSO Male Composite Ultimate Mortality Table is one of the tables adopted by reference in existing §3.9103(d), and is available from the Actuarial Division, Texas Department of Insurance, 333 Guadalupe, Austin, Texas. Proposed new §3.6101(a)(3) and (4) are necessary to establish the appropriate interest rate and method to be used in determining the minimum standard valuation of reserves for credit life policies and certificates issued on or after January 1, 2009. The proposed amendments to §3.6101(a)(1) - (4) are consistent with §425.058(l)(1), (2), and (5) of the Insurance Code and with Appendix A-818 of the March 2009 version of the NAIC's Accounting Practices and Procedures Manual, which is adopted by reference in §7.18. Further, the minimum reserve requirements specified in the proposed amendments to §3.6101(a)(1) - (4) are substantially similar to the current requirements adopted by the NAIC in its model regulation entitled Determining Reserve Liabilities for Credit Life Insurance Model Regulation.

Policy Reserves for Single Premium Accident and Health Insurance Contracts. The proposed amendments to §3.6101(b) are necessary to implement the Insurance Code §425.058(l)(3). Section 425.058(l)(3) requires the Commissioner to establish by rule the minimum reserve standards for single premium credit accident and health contracts issued on or after January 1, 2009, based, in part, on either the 1985 Commissioners Individual Disability Table A (85CIDA), or another Commissioner's Disability Table approved by the NAIC on or after January 1, 2009, for use on credit accident and health policy reserves. The proposed amendments to §3.6101(b) specify that the policy reserve requirements for single premium credit accident and health insurance contracts issued on or after January 1, 2009, are prescribed in §§3.7001, 3.7004, 3.7005, and 3.7006. The minimum reserve requirements specified in these proposed amendments to §3.6101(b) are consistent with §425.058(l)(3) and (5) of the Insurance Code, and are substantially similar to the current minimum reserve requirements adopted by the NAIC in its model regulation entitled Health Insurance Reserves Model Regulation. The proposed amendments to §3.6101(b) also clarify that the minimum reserve requirements for credit accident and health insurance contracts issued after December 31, 1980, and before January 1, 2009, continue to be those minimum reserve requirements in existing §3.6101(b). The proposed amendments to §3.6101(b) also provide that for non-single premium credit accident and health insurance contracts issued on or after January 1, 2009, the minimum reserve requirements are those specified in existing §3.6101(b).

Net Refund Liability for All Credit Insurance Contracts. A proposed amendment to §3.6101 is necessary to add new subsection (c) to require an additional reserve for all credit contracts in the aggregate if the contract reserve is less than the net premium refund liability. The reserve requirements in proposed new §3.6101(c) implement §425.058(l)(4) of the Insurance Code, which: (i) requires an insurer to establish an additional reserve liability that is equal to the excess of the net refund liability over the contract reserve recorded for all credit insurance contracts, if the net premium refund liability exceeds the aggregate recorded contract reserve; and (ii) provides that the net refund liability may include consideration of commission, premium tax, and other expenses recoverable. Proposed new §3.6101(c) simply sets forth these statutory provisions and does not impose any new or additional requirements to those in the statute. Further, proposed new §3.6101(c) replaces a similar requirement in existing §3.6101(a) that was applicable only to all credit life insurance contracts in the aggregate. This §3.6101(a) requirement is proposed for deletion.

Claims Reserves for All Credit Life Insurance Contracts and Credit Accident and Health Insurance Contracts. The proposed amendments to §3.6102(a) are also necessary to implement the Insurance Code §425.058(l)(3). The proposed amendments to §3.6102(a) are necessary to require that the claims reserves for single premium credit accident and health insurance contracts issued on or after January 1, 2009, comply with the claim reserve requirements specified in §3.7002. The minimum reserve requirements specified in these proposed amendments

to §3.6102(a) are consistent with §425.058(l)(3) and (5) of the Insurance Code, and are substantially similar to the current minimum reserve requirements adopted by the NAIC in its model regulation entitled Health Insurance Reserves Model Regulation. An amendment is also proposed to §3.6102(a) to provide that claim reserves for all other credit accident and health insurance contracts and credit life insurance contracts must be based upon appropriate consideration for liability under each of the categories specified in existing §3.6102(a)(1) - (4).

Minimum Reserve Standards for Single Premium Credit Accident and Health Insurance Contracts Issued on or after January 1, 2009. The proposed amendment to §3.7001(a)(1) is needed to clarify that the Subchapter GG standards apply to all individual and group accident and health insurance coverages, including single premium credit accident and health insurance contracts issued on or after January 1, 2009, but not to other types of credit insurance. This proposed amendment is also necessary to implement the Insurance Code §425.058(l)(3). The minimum reserve requirements specified in the proposed amendment to §3.7001(a)(1) are consistent with §425.058(l)(3) and (5) of the Insurance Code, and are substantially similar to the current minimum reserve requirements adopted by the NAIC in its model regulation entitled Health Insurance Reserves Model Regulation.

Claims Reserves for Credit Accident and Health Insurance Contracts. It is also necessary to add a new paragraph (4) to §3.7002(a) to implement the Insurance Code §425.058(l)(3). Proposed new §3.7002(a)(4) specifies that the claim reserves for single premium credit accident and health insurance contracts issued on or after January 1, 2009, must comply with the claim reserve requirements in §3.7002. The minimum reserve requirements specified in proposed new §3.7002(a)(4) are consistent with §425.058(l)(3) and (5) of the Insurance Code and are substantially similar to the current minimum reserve requirements adopted by the NAIC in its model regulation entitled Health Insurance Reserves Model Regulation. Proposed new §3.7002(a)(4) also clarifies that the claim reserves for all other credit accident and health insurance contracts must comply with the claim reserve requirements in §3.6102 of this chapter (relating to Claims Reserves).

Premium Reserves for Single Premium Credit Accident and Health Insurance Contracts. Proposed new §3.7003(a)(2) is necessary to exclude single premium credit accident and health insurance, both individual and group contracts, from the Subchapter GG unearned premium reserve requirements. Proposed new §3.7003(a)(2) is necessary to implement the Insurance Code §425.058(l)(3), is consistent with §425.058(l)(3) and (5) of the Insurance Code, and is substantially similar to the current minimum reserve requirements adopted by the NAIC in its model regulation entitled Health Insurance Reserves Model Regulation. Existing §3.7003(a)(2) and (3) are proposed to be re-designated as §3.7003(a)(3) and (4) without changes to the existing text.

Specific Minimum Standards with Respect to Morbidity and Mortality for Single Premium Credit Accident and Health Insurance Contracts. Proposed new §3.7006(a)(1)(E)(i)(I) and proposed new §3.7006(a)(2)(B)(i)(I) adopt by reference the 1985 Commissioners Individual Disability Table (85CIDA) as the morbidity table to be used for determining the minimum standard of reserves for single premium credit accident and health insurance contracts, both individual and group, issued on or after January 1, 2009. These proposed amendments are also necessary to implement the Insurance Code §425.058(l)(3). Proposed new §3.7006(a)(1)(E)(i)(II) and proposed new §3.7006(a)(2)(B)(i)(II) also are necessary to clarify that the minimum contract reserve requirements for single premium credit accident and health insurance contracts issued prior to January 1, 2009, are the requirements specified in §3.6101(b). Proposed new §3.7006(a)(1)(E)(ii) and proposed new §3.7006(a)(2)(B)(ii) are necessary to require that the claim reserves for single premium credit disability policies issued on or after January 1, 2009, are to be determined in accordance with existing §3.7002(c). Existing §3.7006(a)(1)(E) and §3.7006(a)(2)(B) are proposed to be re-designated as §3.7006(a)(1)(F) and §3.7006(a)(2)(C) without changes to the existing text. The proposed amendments to §3.7006(c)(1) and (4) are necessary to provide that for single premium credit accident and health insurance using the 85CIDA table, no separate mortality shall be assumed. The minimum reserve requirements specified in the proposed amendments to §3.7006(a)(1) and (2) and (c)(1) and (4) are consistent with §425.058(l)(3) and (5) of the Insurance Code, and are substantially similar to the current minimum reserve requirements adopted by the NAIC in its model regulation entitled Health Insurance Reserves Model Regulation.

Actuarial opinions and memorandum requirements. The proposed deletion of §3.6102(c), concerning actuarial opinion requirements, is necessary because it is superseded by Chapter 3, Subchapter Q, concerning actuarial opinion and memorandum requirements for life insurance companies, and §7.65(e)(1)(E), concerning actuarial opinion requirements for property and casualty insurers.

Obsolete statutory citations. Proposed amendments are also necessary to update obsolete statutory citations to the Insurance Code as a result of the enactment of the non-substantive revision of the Insurance Code. This will result in easier use and readability of the rules. Amendments are proposed to §3.6101(a) and §3.7003(b)(1) to update statutory citations to conform with the non-substantive revised Insurance Code. The proposed amendment to §3.6101(a) replaces the statutory reference to "Article 3.53" with "Chapter 1153." Article 3.53 was repealed in the nonsubstantive Insurance Code revision, Acts 2001, 77th Legislature, Chapter 1419, §2, effective June 1, 2003. Article 3.53 was re-adopted as Chapter 1153 in the same nonsubstantive Insurance Code revision. The proposed amendment to §3.7003(b)(1) replaces the statutory reference to "Article 6.01" with "§862.102." Article 6.01 was repealed in the nonsubstantive Insurance Code revision, Acts 2001, 77th Legislature, Chapter 1419, §2, effective June 1, 2003. Article 6.01 was re-adopted as §862.102 in the same nonsubstantive Insurance Code revision.

Other non-substantive amendments. An amendment to the first sentence in §3.6101(a) is proposed to replace the word "title" with "subchapter" to conform to current Texas Register citation style. Proposed amendments are also necessary throughout the proposed amended sections to change references to "%" to "percent" to conform to current Department citation style.

FISCAL NOTE. Danny Saenz, Senior Associate Commissioner, Financial Program, has determined that, for each year of the first five years the proposed amendments will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Mr. Saenz also has determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will

be: (i) improved standards of reserves for credit life and credit accident and health insurance, which will enhance the solvency of insurance companies writing these lines of insurance in Texas; and (ii) more uniform reserve standards for insurance companies writing credit insurance in Texas, which may result in lower regulatory compliance costs for these insurance companies. Additionally, the proposed amendments may also result in less surplus strain for insurance companies that write credit life insurance policies issued on or after January 1, 2009. This is because the Department expects the level of reserves may decrease somewhat on new business for credit life insurance because the 2001 CSO Male Composite Ultimate Mortality Table, which is proposed in §3.6101(a)(1) and (2), reflects mortality improvements from those reflected in the prior table prescribed in existing §3.6101(a) and in the Insurance Code §425.058(l) prior to its amendment pursuant to HB 1761. Mortality tables used for reserves are based on studies of insured mortality which has improved (i.e., decreased) over time. Improved mortality generally produces lower reserves. Any lower reserves are deemed appropriate reserves for the risks involved in this business. Appropriate reserves benefit both the company and the consumer by avoiding costs of holding excess reserves.

Analysis of Potential Costs for Persons Required to Comply with the Proposal. As explained more fully in the paragraphs that follow, the Department does not anticipate any additional cost to persons as a result of the proposed amendments. Any costs to such persons required to comply with the proposed amendments for each year of the first five years the proposed amendments will be in effect are primarily the result of the enactment of HB 1761, and not the result of the adoption, enforcement, or administration of the proposed amendments. The proposed amendments establish new minimum reserve requirements for credit life and single premium credit accident and health insurance contracts issued on or after January 1, 2009. These new minimum reserve requirements replace the minimum reserve requirements in existing §3.6101(a) and (b) and §3.6102(a). An insurance company required to comply with the minimum reserve requirements in these proposed amendments would incur costs substantially similar to the costs currently incurred to comply with the existing minimum reserve requirements in existing §3.6101(a) and (b) and §3.6101(a).

§3.6101(a). The Department does not anticipate any additional cost to persons required to comply with the proposed amendments to §3.6101(a). Section 425.058(l)(2) of the Insurance Code requires the Commissioner to establish by rule the minimum reserve standards for credit life insurance contracts issued on or after January 1, 2009. The Commissioner is statutorily required to adopt minimum reserve standards which include mortality based on either the 2001 CSO Male Composite Ultimate Mortality Table for male and female insureds, or another CSO Mortality Table approved by the National Association of Insurance Commissioners (NAIC) on or after January 1, 2009, for use on credit life policy reserves. Because the NAIC has only approved the 2001 CSO Male Composite Ultimate Mortality Table and has not approved another CSO Mortality Table on or after January 1, 2009, for use on credit life policy reserves, the Commissioner is required under §425.058(l)(2) to adopt rules that include mortality based on the 2001 CSO Male Composite Ultimate Mortality Table for male and female insureds. Therefore, in accordance with §425.058(l)(2)(A) of the Insurance Code, proposed new §3.6101(a)(1) establishes the 2001 CSO Male Composite Ultimate Mortality Table as the appropriate mortality table to use in determining the minimum standard valuation of reserves for credit life policies and certificates issued on or after January 1, 2009, for both male and female insureds. Also in accordance with §425.058(l)(2)(A), proposed new §3.6101(a)(2) establishes that where the credit life insurance policy or certificate insures two lives, the minimum standard shall be twice the mortality in the 2001 CSO Male Composite Ultimate Mortality Table based on the age of the older insured. Proposed new §3.6101(a)(1) and (2) do not impose any new or additional requirements to those in §425.058(l)(2). Therefore, any cost to persons required to comply with these proposed amendments for each year of the first five years the proposed amendments will be in effect result from the legislative enactment of HB 1761, which amended the Insurance Code §425.058(l), and not as a result of the adoption, enforcement, or administration of these proposed amendments. Additionally, in accordance with the Insurance Code §425.058(l)(2), proposed new §3.6101(a)(3) and (4) establish the appropriate interest rate and method to be used in determining the minimum standard valuation of reserves for credit life policies and certificates issued on or after January 1, 2009. Proposed new §3.6101(a)(3) simply replaces the interest rate of up to 5.5 percent currently required under existing §3.6101(a) with the calendar year interest rates as defined in the Insurance Code §§425.060 - 425.063. The minor costs for insurance companies to comply with the interest rate requirements in new §3.6101(a)(3) are substantially similar to the minor costs to comply with the interest rate requirements in existing §3.6101(a). Proposed new §3.6101(a)(4) establishes the commissioners reserve method as defined in the Insurance Code §425.064 as the appropriate method. The commissioners reserve method is the method currently being used by insurance companies for credit life insurance contracts. Thus, proposed new §3.6101(a)(3) and (4) do not result in any additional costs of compliance, and any costs result from the legislative enactment of HB 1761, and not from the adoption, enforcement, or administration of these proposed amendments.

The proposed amendment to §3.6101(a) that provides that Subchapter EE does not apply to credit life insurance is a non-substantive amendment that does not impose any additional requirements and therefore, does not result in any additional costs to persons required to comply with the proposed amendment.

§§3.6101(b), 3.6102(a), 3.7001(a)(1), 3.7002(a)(4), 3.7003(a)(2), 3.7006(a)(1)(E)(i)(I) and (ii), 3.7006(a)(2)(B)(i)(I) and (ii), and 3.7006(c)(1) and (4). The Department does not anticipate any additional cost to persons required to comply with the proposed amendments to §§3.6101(b), 3.6102(a), 3.7001(a)(1), 3.7002(a)(4), 3.7003(a)(2), 3.7006(a)(1)(E)(i)(I) and (ii), 3.7006(a)(2)(B)(i)(I) and (ii), and 3.7006(c)(1) and (4) that implement §425.058(l)(3) of the Insurance Code. Section 425.058(l)(3) requires the Commissioner to establish by rule the minimum reserve standards for single premium credit accident and health contracts issued on or after January 1, 2009. The Commissioner is statutorily required to adopt minimum reserve standards which include morbidity based on either the 1985 Commissioners Individual Disability Table A (85CIDA), or another Commissioner's Disability Table approved by the NAIC on or after January 1, 2009, for use on credit accident and health policy reserves. Because the NAIC has only approved the 85CIDA and has not approved another Commissioner's Disability Table on or after January 1, 2009, for use on single premium credit accident and health policy reserves, the Commissioner is required under §425.058(l)(3) to adopt rules that include morbidity based on the 85CIDA. Therefore, in accordance with §425.058(l)(3)(A) of the Insurance Code,

the proposed amendments to §§3.6101(b), 3.7001(a)(1), 3.7006(a)(1)(E)(i)(I), 3.7006(a)(2)(B)(i)(I), and 3.7006(c)(1) and (4) establish the minimum reserve standards for single premium credit accident and health contracts issued on or after January 1, 2009, based upon the 85CIDA. As a result, any cost to persons required to comply with these proposed amendments to §§3.6101(b), 3.7001(a)(1), 3.7006(a)(1)(E)(i)(I), 3.7006(a)(2)(B)(i)(I), and 3.7006(c)(1) and (4) result from the legislative enactment of HB 1761, which amends the Insurance Code §425.058(l), and not as a result of the adoption, enforcement, or administration of these proposed amendments.

Furthermore, these proposed amendments do not impose any new or additional costs to those required to comply with the statutory requirements in §425.085(l)(3)(A). Additionally, in accordance with the Insurance Code §425.058(l)(3), the proposed amendments to §§3.6102(a), 3.7001(a)(1), 3.7002(a)(4), 3.7006(a)(1)(E)(ii), and 3.7006(a)(2)(B)(ii) establish the appropriate minimum claim reserves standards to be used for single premium credit accident and health insurance contracts issued on or after January 1, 2009. Any cost to persons required to comply with these proposed amendments to §§3.6102(a), 3.7001(a)(1), 3.7002(a)(4), 3.7006(a)(1)(E)(ii), and 3.7006(a)(2)(B)(ii) result from the legislative enactment of HB 1761, which amended the Insurance Code §425.058(l), and not as a result of the adoption, enforcement, or administration of these proposed amendments.

Further, the claim reserve requirements in the proposed amendments to §§3.6102(a), 3.7001(a)(1), 3.7002(a)(4), 3.7006(a)(1)(E)(ii), and 3.7006(a)(2)(B)(ii) simply replace the current claim reserves requirements in existing §3.6102(a) for single premium credit accident and health insurance contracts issued on or after January 1, 2009. The costs to insurance companies to comply with the claims reserve requirements in these proposed amendments are substantially similar to the costs to comply with the claim reserve requirements in existing §3.6102(a). Therefore, the Department does not anticipate any additional cost to persons required to comply with the proposed amendments to §§3.6102(a), 3.7001(a)(1), 3.7002(a)(4), 3.7006(a)(1)(E)(ii), and 3.7006(a)(2)(B)(ii).

Also, new §3.7003(a)(2) simply provides that the unearned minimum premium reserve requirements of Subchapter GG do not apply to single premium credit accident and health insurance, both group and individual. Thus, proposed new §3.7003(a)(2) does not result in any anticipated additional costs for persons required to comply with this proposed amendment.

§3.6101(a) and (b) and §3.6102(a). The proposed amendments to §3.6101(a) and (b) and §3.6102(a) also clarify the existing minimum reserve requirements for credit life insurance contracts issued prior to January 1, 2009, and for all credit accident and health insurance contracts except single premium credit accident and health insurance contracts issued on or after January 1, 2009. These non-substantive amendments do not impose any additional requirements and therefore, do not impose any additional costs on persons required to comply with the proposed amendments.

§3.6101(c). The Department does not anticipate any additional cost to persons required to comply with proposed new §3.6101(c). Section 425.058(l)(4) of the Insurance Code: (i) requires an insurer to establish an additional reserve liability that is equal to the excess of the net refund liability over the contract reserve recorded for all credit insurance contracts, if the net premium refund liability exceeds the aggregate recorded contract reserve; and (ii) provides that the net refund liability may include consideration of commission, premium tax, and other expenses recoverable. Proposed new §3.6101(c) simply sets forth these statutory provisions and does not impose any new or additional requirements to those in the statute. Therefore, any cost to persons required to comply with proposed new §3.6101(c) for each year of the first five years the proposed amendments will be in effect result from the legislative enactment of HB 1761, which amended the Insurance Code §425.058(l), and not as a result of the adoption, enforcement, or administration of proposed new §3.6101(c).

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. In accordance with the Government Code §2006.002(c), the Department has determined the proposed amendments will not have an adverse economic effect on small business or micro business insurance companies that are required to comply with the proposal. As outlined in detail in the Public Benefit/Cost Note analysis part of this proposal, the proposed amendments do not impose any new requirements or costs with which businesses, including small and micro businesses as defined by the Government Code §2006.001(1) and (2), must comply. Any costs to persons required to comply with these proposed amendments are the result of the enactment of HB 1761, and not the result of the adoption, enforcement, or administration of the proposed amendments. In accordance with the Government Code §2006.002(c), the Department has therefore determined that a regulatory flexibility analysis is not required because the proposal will not have an adverse impact on small or micro business insurance companies.

However, even if the proposed amendments or the statutory requirements reiterated in the proposed amendments should result in an adverse economic impact on small or micro business insurance companies, the Department, in accordance with the Government Code §2006.002(c-1), has determined that the Department is not required to prepare a regulatory flexibility analysis as required in §2006.002(c)(2) of the Government Code. Section 2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on small businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Section 2006.002(c-1) of the Government Code requires that the regulatory flexibility analysis ". . . consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses." Therefore, an agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small and micro-businesses, would not be protective of the health, safety, and environmental and economic welfare of the state.

The proposed amendments to §§3.6101, 3.6102, 3.7001 - 3.7003, and 3.7006 are authorized by the following Insurance Code statutes: §421.001(c) and §425.058(l). The primary purpose of these statutes is to require insurance companies writing credit life or credit accident and health insurance contracts to maintain appropriate levels of minimum reserve liabilities relative to the type of insurance policies being written. These minimum reserve requirements will ensure the financial solvency of the insurance companies for the protection of policyholders, enrollees, creditors, and the general public from the harmful effects of carrier insolvency. The legislative intent of §421.001(c) and §425.058(l) is that all policyholders or enrollees benefit

from the minimum reserve requirements, and not just those policyholders or enrollees that purchase insurance contracts from large insurance companies that do not qualify as small or micro businesses under the Government Code §2006.001(a)(1) and (2).

The purpose of the proposed amendments to §§3.6101, 3.6102, 3.7001 - 3.7003, and 3.7006 is to protect the economic welfare of: (i) insurance companies writing credit life and credit accident and health insurance contracts; (ii) consumers that purchase insurance contracts issued by these insurance companies; (iii) other persons and entities that would be adversely affected by an insurance company insolvency against the risk that an insurance company may become insolvent and unable to pay its insureds' claims and other obligations as they become due; and (iv) the public and the state of Texas generally.

The requirements in the proposed amendments to §§3.6101, 3.6102, 3.7001 - 3.7003, and 3.7006 that insurance companies establish and maintain minimum reserves at levels at or above the minimum reserves required by the reserve standards in the proposed amendments are consistent with and necessary to implement the legislative intent of §421.001(c) and §425.058(l) of the Insurance Code. This intent is to ensure the financial solvency of an insurance company, regardless of size, for the protection of the economic interests of all policyholders and not just the economic interests of those policyholders insured by large insurance companies.

Therefore, the Department has determined, in accordance with §2006.002(c-1) of the Government Code, that because the purpose of the proposed amendments to §§3.6101, 3.6102, 3.7001 - 3.7003, and 3.7006 and the authorizing statutes of the Insurance Code is to protect carrier and consumer economic interests and the state's economic welfare, there are no additional regulatory alternatives to the minimum reserve standards and requirements that will sufficiently protect the economic interests of carriers and consumers and the economic welfare of the state.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on October 26, 2009, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be simultaneously submitted to Danny Saenz, Senior Associate Commissioner, Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

SUBCHAPTER FF. CREDIT LIFE AND CREDIT ACCIDENT AND HEALTH INSURANCE
DIVISION 11. POLICY AND CLAIMS RESERVES

28 TAC §3.6101, §3.6102

STATUTORY AUTHORITY. The amendments are proposed under the Insurance Code §§421.001(c), 425.058(l), and 36.001. Section 421.001(c) requires the Commissioner to adopt each current formula recommended by the National Association of Insurance Commissioners for establishing reserves for each line of insurance. Section 425.058(l)(1) provides that notwithstanding any other law, the minimum reserve requirements applicable to a credit life policy issued under Chapter 1153 before January 1, 2009, are met if, in the aggregate, the reserves are maintained at 100 percent of the 1980 Commissioner's Standard Ordinary Mortality Table, with interest that does not exceed 5.5 percent. Section 425.058(l)(2) provides that for credit life policy reserves on contracts issued to be effective on or after January 1, 2009, the reserve requirements shall be based on the minimum reserve standards established by the Commissioner by rule. The Commissioner shall adopt the rules based on either the 2001 CSO Male Composite Ultimate Mortality Table for male and female insureds; or another CSO Mortality Table approved by the National Association of Insurance Commissioners on or after January 1, 2009, for use on credit life policy reserves. Section 425.058(l)(3) provides that for a single premium credit accident and health contract issued on or after January 1, 2009, the reserve requirements shall be based on minimum reserve standards established by the Commissioner by rule. The Commissioner shall adopt the rules based on either the 1985 Commissioners Individual Disability Table A (85CIDA), or another Commissioner's Disability Table approved by the National Association of Insurance Commissioners on or after January 1, 2009, for use on credit accident and health policy reserves. Section 425.058(l)(4) provides that for all credit insurance contracts, if the net premium refund liability exceeds the aggregate recorded contract reserve, the insurer shall establish an additional reserve liability that is equal to the excess of the net refund liability over the contract reserve recorded. Section 425.058(l)(4) further provides that the net refund liability may include consideration of commission, premium tax, and other expenses recoverable. Section 425.058(l)(5) provides that in addition to the rules required to be adopted under this subsection, the Commissioner may adopt other rules to implement this subsection. Section 36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code §412.001(c) and §425.058(l).

§3.6101. Policy Reserves.

(a) Except as provided in §3.6102 of this subchapter [~~title~~] (relating to Claims Reserves), the minimum reserves for premium refunds required by these rules and the payment of benefits under outstanding credit life insurance policies and certificates issued prior to January 1, 2009, may not be less in the aggregate than 130 percent [~~%~~] of the reserves computed on the 1958 CSO Mortality Table with interest not to exceed 5.5 percent [~~%~~]; or, at the option of the company, such reserves may be maintained at 100 percent [~~%~~] of the reserves computed on the 1941 CSO Mortality Table or the 1958 CET Mortality Table with interest not to exceed 5.5 percent [~~%~~]; or 150 percent [~~%~~] of the 1980 CSO Mortality Table with interest not to exceed 5.5 percent [~~%~~]; provided, however, notwithstanding any other law or rule, the minimum reserve requirements for policy reserves applicable to credit life policies and certificates issued prior to January 1, 2009, under [~~Article 3.53 of~~] the Insurance Code Chapter 1153 or these rules are met if, in aggregate,

the reserves are maintained at 100 percent [%] of the 1980 CSO Mortality Table, with interest not to exceed 5.5 percent [%]. [~~Such policy reserves, in aggregate, must not be less than the premium refund liability, which may include consideration of commission, premium tax, and other expenses recoverable.~~] Subchapter EE of this chapter (relating to Valuation of Life Insurance Policies) shall not apply to credit life insurance. For credit life insurance policies and certificates issued on or after January 1, 2009, the minimum reserve requirements are as follows:

(1) The minimum standard for both male and female insureds shall be the 2001 CSO Male Composite Ultimate Mortality Table. This table contains rates of mortality that do not distinguish between smokers and nonsmokers and is one of the tables contained in the 2001 CSO Mortality Table adopted by reference in §3.9103(d) of this chapter (relating to 2001 CSO Mortality Table).

(2) Where the credit life insurance policy or certificate insures two lives, the minimum standard shall be twice the mortality in the 2001 CSO Male Composite Ultimate Mortality Table based on the age of the older insured.

(3) The interest rates used in determining the minimum standard of valuation shall be the calendar year valuation interest rates as defined in the Insurance Code §§425.080 - 425.083.

(4) The method used in determining the minimum standard for valuation shall be the commissioners reserve method as defined in the Insurance Code §425.064.

(b) The policy reserve requirements for single premium credit accident and health insurance contracts issued on or after January 1, 2009, are prescribed in §§3.7001, 3.7004, 3.7005, and 3.7006 of this chapter (relating to Introduction; Contract Reserves; Reinsurance; and Specific Standards for Morbidity, Interest, and Mortality). The policy reserve requirements for credit accident and health insurance contracts issued [~~or disability insurance which has an effective date~~] after December 31, 1980, and before January 1, 2009, and for non-single premium credit accident and health insurance contracts issued on or after January 1, 2009, may not be less than the product rounded to the next higher dollar of the gross presumptive single premium rate per $100 of insured indebtedness for the term of the indebtedness remaining as of the valuation date times the number of hundreds of dollars of indebtedness outstanding as of the valuation date (herein called the rule of anticipation) or, as an alternative and at the option of the insurer, the mean of the gross unearned premium calculated by the "sum of the digits" (rule of 78) and the pro rata methods. The reserve for such insurance which has an effective date prior to January 1, 1981, may not be less than the gross unearned premium calculated by the sum of the digits (rule of 78) method.

(c) Pursuant to the Insurance Code §425.058(l)(4), for all credit insurance contracts, if the net premium refund liability exceeds the aggregate recorded contract reserves, the insurer shall establish an additional reserve liability that is equal to the excess of the net refund liability over the contract reserve recorded. The net refund liability may include consideration of commission, premium tax, and other expenses recoverable.

§3.6102. Claims Reserves.

(a) The insurer shall set up adequate reserves for claims on credit life and credit accident and health insurance, in addition to the policy reserves already described in §3.6101 of this subchapter (relating to Policy Reserves). Claim reserves for single premium credit accident and health insurance contracts issued on or after January 1, 2009, must comply with the claim reserve requirements in §3.7002 of this chapter (relating to Claim Reserves). Claim reserves for all other credit accident and health insurance contracts and credit life insurance contracts[~~. Such claims reserves~~] shall be based upon appropriate consideration for liability under each of the following categories:

(1) - (4) (No change.)

(b) (No change.)

[~~(c) An actuary of the insurer will be expected to take into appropriate consideration all of the above categories when furnishing the required actuarial opinion with respect to the aggregate reserve for life policies and contracts (Exhibit 8 of the annual statement blank), and the policy and contract claims liability end of current year (Exhibit 11, Part 1, of the annual statement blank).~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 10, 2009.

TRD-200903976
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 463-6327

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SUBCHAPTER GG. MINIMUM RESERVE STANDARDS FOR INDIVIDUAL AND GROUP ACCIDENT AND HEALTH INSURANCE

28 TAC §§3.7001 - 3.7003, 3.7006

STATUTORY AUTHORITY. The amendments are proposed under the Insurance Code §§421.001(c), 425.058(l), and 36.001. Section 421.001(c) requires the Commissioner to adopt each current formula recommended by the National Association of Insurance Commissioners for establishing reserves for each line of insurance. Section 425.058(l)(1) provides that notwithstanding any other law, the minimum reserve requirements applicable to a credit life policy issued under Chapter 1153 before January 1, 2009, are met if, in the aggregate, the reserves are maintained at 100 percent of the 1980 Commissioner's Standard Ordinary Mortality Table, with interest that does not exceed 5.5 percent. Section 425.058(l)(2) provides that for credit life policy reserves on contracts issued to be effective on or after January 1, 2009, the reserve requirements shall be based on the minimum reserve standards established by the Commissioner by rule. The Commissioner shall adopt the rules based on either the 2001 CSO Male Composite Ultimate Mortality Table for male and female insureds; or another CSO Mortality Table approved by the National Association of Insurance Commissioners on or after January 1, 2009, for use on credit life policy reserves. Section 425.058(l)(3) provides that for a single premium credit accident and health contract issued on or after January 1, 2009, the reserve requirements shall be based on minimum reserve standards established by the Commissioner by rule. The Commissioner shall adopt the rules based on either the 1985 Commissioners Individual Disability Table A (85CIDA), or another Commissioner's Disability Table approved by the National Association of Insurance Commissioners on or after January 1, 2009, for use on credit accident and health policy reserves. Section 425.058(l)(4) provides that for all credit insur-

ance contracts, if the net premium refund liability exceeds the aggregate recorded contract reserve, the insurer shall establish an additional reserve liability that is equal to the excess of the net refund liability over the contract reserve recorded. Section 425.058(l)(4) further provides that the net refund liability may include consideration of commission, premium tax, and other expenses recoverable. Section 425.058(l)(5) provides that in addition to the rules required to be adopted under this subsection, the Commissioner may adopt other rules to implement this subsection. Section 36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code §412.001(c) and §425.058(l).

§3.7001. Introduction.

(a) Scope and general standards.

(1) These standards apply to all individual and group accident and health insurance coverages, including single premium credit accident and health insurance contracts issued on or after January 1, 2009. All other [~~except~~] credit insurance is not subject to these standards.

(2) - (5) (No change.)

(b) - (c) (No change.)

§3.7002. Claim Reserves.

(a) General.

(1) - (3) (No change.)

(4) Claim reserves for single premium credit accident and health insurance contracts issued on or after January 1, 2009, must comply with the claim reserve requirements in this section. Claim reserves for all other credit accident and health insurance contracts must comply with the claim reserve requirements in §3.6102 of this chapter (relating to Claims Reserves).

(b) - (c) (No change.)

§3.7003. Premium Reserves.

(a) General.

(1) (No change.)

(2) Single premium credit accident and health insurance, both individual and group, is excluded from the unearned premium reserve requirements of this subchapter.

(3) [~~(2)~~] If premiums due and unpaid are carried as an asset, such premiums must be treated as premiums in force, subject to unearned premium reserve determination. The value of unpaid commissions, premium taxes, and the cost of collection associated with due and unpaid premiums must be carried as an offsetting liability.

(4) [~~(3)~~] The gross premiums paid in advance for a period of coverage commencing after the next premium due date which follows the date of valuation may be appropriately discounted to the valuation date and shall be held either as a separate liability or as an addition to the unearned premium reserve which would otherwise be required as a minimum.

(b) Minimum standards for unearned premium reserves.

(1) The minimum unearned premium reserve with respect to any contract is an amount which is not in excess of the amount or inconsistent with the methods established by the Insurance Code §862.102 [~~, Article 6.01~~]. The minimum standard shall be the pro rata unearned modal premium that applies to the premium period beyond the valuation date, with such premium determined on the basis of:

(A) - (B) (No change.)

(2) (No change.)

(c) (No change.)

§3.7006. Specific Standards for Morbidity, Interest, and Mortality.

(a) Morbidity.

(1) Minimum morbidity standards for valuation of specified individual contract health insurance benefits are as follows.

(A) - (D) (No change.)

(E) Single premium credit accident and health.

(i) Contract reserves.

(I) For contracts issued on or after January 1, 2009:

(-a-) for plans having less than a 30-day elimination period, the 1985 Commissioners Individual Disability Table A (85CIDA) with claim incidence rates increased by 12 percent.

(-b-) for plans having a 30-day and greater elimination period, the 85CIDA for a 14-day elimination period with the adjustment specified in item (-a-) of this subclause.

(II) For contracts issued prior to January 1, 2009, the minimum contract reserve requirements are specified in §3.6101(b) of this chapter (relating to Policy Reserves).

(ii) Claim reserves. Claim reserves are to be determined in accordance with §3.7002(c) of this subchapter (relating to Claim Reserves).

(F) [~~(E)~~] Other individual contract benefits.

(i) Contract reserves. For all other individual contract benefits, morbidity assumptions are to be determined as provided in the reserve standards.

(ii) Claim reserves. For all benefits other than disability, claim reserves are to be determined as provided in the standards.

(2) Minimum morbidity standards for valuation of specified group contract health insurance benefits are as follows.

(A) (No change.)

(B) Single premium credit accident and health.

(i) Contract reserves.

(I) For contracts issued on or after January 1, 2009:

(-a-) for plans having less than a 30-day elimination period, the 1985 Commissioners Individual Disability Table A (85CIDA) with claim incidence rates increased by 12 percent.

(-b-) for plans having a 30-day and greater elimination period, the 85CIDA for a 14-day elimination period with the adjustment specified in item (-a-) of this subclause.

(II) For contracts issued prior to January 1, 2009, the minimum contract reserve requirements are specified in §3.6101(b) of this chapter.

(ii) Claim reserves. Claim reserves are to be determined in accordance with §3.7002(c) of this subchapter.

(C) [~~(B)~~] Other group contract benefits.

(i) Contract reserves. For all other group contract benefits, morbidity assumptions are to be determined as provided in the reserve standards.

(ii) Claim reserves. For all benefits other than disability, claim reserves are to be determined as provided in the standards.

(b) (No change.)

(c) Mortality.

(1) Except as provided in paragraphs (2), [~~and~~] (3), and (4) of this subsection, the mortality basis used must be according to a table (but without use of selection factors) permitted by law for the valuation of whole life insurance issued on the same date as the health insurance contract.

(2) - (3) (No change.)

(4) For single premium credit accident and health insurance using the 85CIDA table, no separate mortality shall be assumed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 10, 2009.

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Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
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For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER H. EMISSIONS BANKING AND TRADING

DIVISION 7. CLEAN AIR INTERSTATE RULE

30 TAC §§101.502, 101.504, 101.506

The Texas Commission on Environmental Quality (commission or agency) proposes amendments to §§101.502, 101.504, and 101.506.

The amended sections are proposed to be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of this Clean Air Interstate Rule (CAIR) revision is to incorporate legislative changes made during the 80th Texas Legislature, 2007, as prescribed by Senate Bill (SB) 1672 and federal rule revisions that the EPA has promulgated since Texas adopted the state's initial CAIR rule on July 12, 2006. Also, clarifying language is proposed to explain the allocation methodology for the 2016 and 2017 control periods for CAIR nitrogen oxides (NO_x) units commencing operation before January 1, 2001. Additionally, grammatical and formatting changes are proposed to conform with *Texas Register* and commission standards.

On May 12, 2005, the EPA promulgated CAIR to assist nonattainment areas in downwind states in complying with the National Ambient Air Quality Standards (NAAQS) for particulate matter less than or equal to 2.5 microns ($PM_{2.5}$) and eight-hour ozone. Twenty-eight eastern states and the District of Columbia were identified as upwind contributors to the nonattainment of the $PM_{2.5}$ and/or eight-hour ozone NAAQS prompting the requirement for the reduction in emissions of either sulfur dioxide (SO_2) or NO_x, or both. Twenty-five states, including Texas and the District of Columbia, were found to contribute to the downwind nonattainment of the $PM_{2.5}$ NAAQS and are required to make reductions in annual emissions of SO_2 and NO_x.

The 79th Texas Legislature, 2005, enacted House Bill (HB) 2481, §2 (codified at Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.0173), requiring Texas to participate in the EPA-administered interstate cap and trade program through the incorporation by reference of the CAIR model trading rule. HB 2481 also specified the methodology to be used in allocating the NO_x trading budget provided to Texas, identified an amount of CAIR NO_x annual allowances to be set aside for new sources, and specified that reductions associated with CAIR would only be required from new and existing electric generating units (EGUs) and not from other sources of SO_2 and NO_x emissions.

In 2007, the 80th Texas Legislature passed SB 1672 directing the commission to incorporate federal CAIR changes that the EPA finalized since the initial adoption of the CAIR rule on July 12, 2006. SB 1672 also revised the NO_x allocation methodology and the number of minimum periods specified for NO_x allocation readjustments that was directed by HB 2481. The readjustment of baseline heat inputs required in HB 2481 was the average of the three highest amounts of the CAIR NO_x units' total converted/adjusted control period heat input from control periods one through five of the previous seven control periods, with the baseline adjustment starting for the 2016 control period and readjusted every five years thereafter. However, the seven-year period did not provide adequate time to accommodate the EPA's requirement of providing allocations to applicable EGUs approximately four years in advance. SB 1672 changed the number of control periods from seven to nine and shifted the initial baseline adjustment from 2016 to 2018. Therefore, beginning with the 2018 control period and for the control period beginning every five years after 2018, CAIR NO_x units with a baseline heat input will be adjusted to reflect the average of the three highest amounts of the CAIR NO_x unit's total converted control period heat input from control periods one through five of the previous nine control periods.

Because of the shift in control periods for readjusting the baseline heat input, an allocation method is needed for 2016 and 2017. For the 2016 and 2017 control periods, CAIR NO_x units commencing operation on or after January 1, 2001, and having five or more consecutive years of commercial operation will be eligible to receive a CAIR NO_x allocation from the general pool, which is calculated as 90.5% of the Texas CAIR NO_x trading budget. Beginning in the 2018 control period, CAIR NO_x units commencing operation on or after January 1, 2001, and having five or more consecutive years of commercial operation will be eligible to receive CAIR NO_x annual allowances from the gen-

eral pool if the units have a baseline heat input calculated from the applicable control periods. For example, a CAIR NO_x unit commences operation (i.e., the combustion chamber started) and commences commercial operation (i.e., begins to produce electricity) in 2010. Per SB 1672, the baseline heat input used for allocating general pool allowances for control periods 2018 through 2022 is determined from units that have 2009 through 2013 operating data. Therefore, this unit would not be eligible to receive an allocation of allowances from the general pool until 2023.

SB 1672 also omits the reference dates of the federal CAIR adoption that were specified in HB 2481 from the 79th Texas Legislature. This change will enable the commission to make subsequent changes as dictated by federal rule changes for CAIR without further legislative authority.

The proposed rule revision also incorporates revisions to the federal CAIR model trading rules. The EPA adopted revisions to 40 Code of Federal Regulations (CFR) Part 96 Subpart AA - Subpart II and Subpart AAA - Subpart III on April 28, 2006. In the April 28, 2006, revisions, the EPA changed the compliance dates for companies to submit a request for allowances from the new unit set-aside trading budget (9.5% of the Texas CAIR NO_x trading budget) from July 1st to May 1st of the control period. For additional information regarding these revisions, please see the EPA final rule, published in the April 28, 2006, issue of the *Federal Register* (73 FR 82), available online at *www.epa.gov/fedrgstr/*.

On January 24, 2008, the EPA adopted revisions to 40 CFR Parts 72 and 75 that modify existing requirements for sources affected by CAIR. The revisions include changes implemented by the EPA's Clean Air Markets Division in its data system in order to utilize the latest modern technology. The EPA also adopted revisions to require individuals that perform emissions testing or continuous emissions monitoring system (CEMS) performance evaluations must comply with American Society for Testing and Materials (ASTM) D7036-04 "Standard Practice for Competence of Air Emission Testing Bodies." The ASTM standard sets minimum requirements for demonstrating that an air emission testing organization is competent to perform testing. For additional information regarding these revisions, please see the EPA final rule, published in the January 24, 2008, issue of the *Federal Register* (73 FR 16), available online at *www.epa.gov/fedrgstr/*.

On July 11, 2008, the United States Court of Appeals District of Columbia Circuit (Court) vacated CAIR and the CAIR Federal Implementation Plan. The Court ruled that CAIR trading programs are flawed for the following reasons: 1) because the region-wide focus on emission reductions did not factor in each state's contribution to air pollution issues; 2) the EPA did not give independent significance to the "interfere with maintenance language" in Federal Clean Air Act (FCAA), §110(a)(2)(D) and thus did not provide enough protection to downwind areas; 3) the 2015 compliance date for Phase II of CAIR is inconsistent with downwind states' 2010 attainment deadlines for $PM_{2.5}$ and ozone NAAQS; 4) SO_2 and NO_x budgets given to states were not based on the objectives of FCAA, §110(a)(2)(D) and were thus invalid; 5) the EPA lacked authority to remove Title IV allowances through CAIR or change the amount of SO_2 emissions that an individual allowance authorizes; and 6) the EPA did not properly address certain claims of measurement errors raised by Minnesota regarding its contributions to NO_x and SO_2 emissions.

On December 23, 2008, the Court issued a revised opinion to remand without vacating CAIR back to the EPA. Therefore, the federal CAIR rule requirements remain in effect pending the promulgation by the EPA of new rules to replace it. With CAIR incorporated by reference by THSC, TCAA, §382.0173, the CAIR state rule remains in effect while the federal CAIR rule is in effect.

SECTION BY SECTION DISCUSSION

In addition to the proposed amendments to implement SB 1672 and incorporate federal rule revisions promulgated by the EPA, this rulemaking includes grammatical and formatting changes to update rule language to current *Texas Register* style and formatting requirements. These changes are non-substantive and are not specifically discussed in this preamble.

Section 101.502, Clean Air Interstate Rule Trading Program.

The proposed revision to §101.502 updates the reference to the adoption date of October 19, 2007, effective November 19, 2007, for 40 CFR Part 96, Subpart AA - Subpart II and Subpart AAA - Subpart III.

Section 101.504, Timing Requirements for Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations.

The proposed revisions to §101.504 update the deadlines by which the executive director must submit to the EPA the CAIR NO_x annual allowance allocations for each CAIR NO_x unit subject to this division in order to comply with the minimum lead time of three years provided under 40 CFR §51.123(o)(2)(ii). The deadline to submit CAIR NO_x allocations for 2016 will be revised to October 31, 2012. Beginning in the 2017 control period and each control period thereafter, the CAIR NO_x annual allowances allocations must be submitted to the EPA 38 months prior to the beginning of the applicable control period.

The proposed revisions include deleting §101.504(c) to agree with the removal of the allocation provisions in the federal CAIR rule under 40 CFR §96.141(b)(2) and (c)(2). These provisions were originally incorporated so the EPA could allocate CAIR NO_x annual allowances if a state failed to submit timely CAIR NO_x annual allowance allocations for a control period, but the provisions were removed by the EPA in the revision published in the April 28, 2006, issue of the *Federal Register* (71 FR 82), available online at *www.epa.gov/fedrgstr/*.

The existing subsection (d) is proposed to be re-lettered as subsection (c).

Section 101.506, Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations.

The proposed revisions to §101.506(a) describe the methodology used in distributing CAIR NO_x annual allowances, in tons, for each CAIR NO_x unit subject to this subsection. For control periods 2009 through 2017, the baseline heat input for CAIR NO_x units commencing operation before January 1, 2001, will be the average of the three highest amounts of the CAIR NO_x unit's historical heat input, adjusted for fuel type, from calendar years 2000 through 2004. As required by SB 1672, beginning with the 2018 control period and for the control period beginning every five years thereafter, the baseline heat input for CAIR NO_x units commencing operation before January 1, 2001, will be readjusted using the average of the three highest amounts of the CAIR NO_x unit's control period heat input, adjusted for fuel type, from control periods one through five of the previous nine control periods.

Under the proposed revisions to §101.506(b)(2) and (3), for control periods 2015, 2016, and 2017, CAIR NO_x units commencing

operation on or after January 1, 2001, with five or more consecutive years of operation will be eligible to receive CAIR NO_x annual allowances from the general pool by establishing a baseline heat input from the first five years of commercial operation. As required by SB 1672, for the 2018 control period and every five years thereafter, the baseline heat input for CAIR NO_x units commencing operation on or after January 1, 2001, will be readjusted using the converted control period heat inputs from one through five of the previous nine control periods.

The proposed revisions to §101.506(d) incorporate federal rule revisions to CAIR changing the submittal deadline from July 1st to May 1st. Therefore, the proposed amendments to §101.506(d) require CAIR-designated representatives of CAIR NO_x units that commence operation on or after January 1, 2001, and that have not established a historical baseline heat input in accordance with §101.506(b)(2) or (3), to submit requests for CAIR NO_x annual allowances from the new unit set-aside trading budget on or before May 1st of the first control period for which the requests are being made and after the date that the CAIR NO_x units commence commercial operation.

The proposed revisions to §101.506(g) incorporate federal rule revisions to CAIR changing the submittal deadline from July 1st to May 1st and delete the word "complete" to clarify the submittal deadline. Therefore, the proposed revision to §101.506(g) requires the gross electrical output of the generator or generators served by the CAIR NO_x unit and total heat energy of any steam produced by the CAIR NO_x unit to be submitted in writing to the executive director by the latter of May 1, 2011, or May 1st of the control period immediately following the CAIR NO_x unit's fifth consecutive year of commercial operation. For example, CAIR NO_x unit "B2" commences operation on December 23, 2003, and commences commercial operation on January 9, 2004. The CAIR-designated representative or alternate must submit to the commission by May 1, 2011, the total yearly gross electrical output and the total yearly heat energy of any steam produced by B2 from January 9, 2004, through December 31, 2008.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The agency will implement the proposed rules utilizing current resources. Local governments that own or operate EGUs may pay additional monitoring and testing costs, but these additional costs are not expected to be significant.

The proposed rules implement the provisions of SB 1672, which allow the agency to comply with changes made to the federal CAIR by the EPA. Recent federal court decisions require the EPA to revise its original proposed rule but until those revisions have been adopted, the most recent federal CAIR rules are adopted by reference in SB 1672. Specifically, SB 1672 expands the number of control periods that are used to calculate the baseline, which in turn is used to calculate the heat input of a unit from seven to nine years. The baseline would govern the amount of NO_x that would be permissible under CAIR. SB 1672 also requires the agency to implement other CAIR provisions that the EPA finalized after SB 1672 was passed. These provisions include a change in the deadline that companies must comply with for submitting their request for NO_x emission allowances and additional testing and monitoring options that EGUs can use to measure and report these emissions. The EPA has also mandated that those performing CEMS evaluations and stack testing comply with ASTM D7036-04 requirements so that they can demonstrate competence in performing these monitoring tasks.

The proposed rules will apply to any stationary, fossil-fuel-fired boiler or combustion turbine serving at any time a generator with a nameplate capacity of more than 25 megawatts of electricity that produces electricity for sale. It is estimated that there may be as many as 400 of these types of machines that fit the criteria governed by the proposed rule and the federal statute. Staff estimates that approximately 48 of these types of boilers or combustion turbines are owned by local governments operating EGUs, and approximately 352 are thought to be owned by large businesses operating EGUs.

The proposed rules, which implement the EPA requirements, will require that companies performing CEMS evaluations and stack testing comply with ASTM D7036-04 requirements. The EPA has estimated that compliance with ASTM D7036-04 requirements may require a company planning to test for CAIR compliance pay as much as $100 per year to test its ability to comply with ASTM D7036-04 standards and a one-time cost of about $4,000 to establish a quality CAIR monitoring program. A testing company is expected to spread these costs to all the EGUs that choose the company to perform the needed CEMS evaluations and stack testing, and no one EGU, including those owned by local governments, is expected to experience significant cost increases as a result of the proposed rules.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state and federal laws and increased environmental protection due to the reduction of NO_x and SO_2 emissions from stationary sources at affected EGUs.

No significant fiscal implications are anticipated for businesses or individuals as a result of the implementation of the proposed rules. Any additional costs to EGUs to implement the proposed rules are not expected to be significant and would be anticipated to be spread out over the customer base of the EGU, resulting in small cost increases to its customers. Approximately 352 of the estimated 400 stationary sources governed by the proposed rule are thought to be owned by large businesses operating EGUs. An owner or operator of an EGU will typically contract a company to do testing and CEMS certification. There are over 240 national and international testing companies and at least 19 of these companies may be located in Texas. Most testing companies are thought to be small businesses, and the EPA has estimated that the companies will incur some additional costs, although not anticipated to be significant, to comply with ASTM D7036-04 standards. These additional costs, which are found in the COSTS TO STATE AND LOCAL GOVERNMENT section of this preamble, are not expected to have a significant fiscal implication for EGUs owned by large businesses because testing companies are expected to spread increased costs among several customers.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Although staff does not have the data needed to estimate how many companies that might perform CEMS evaluations and stack testing for CAIR

requirements, staff believes that many of them might be small or micro-businesses. The EPA has estimated that compliance with ASTM D7036-04 requirements may require a company planning to test for CAIR compliance pay as much as $100 per year to test its ability to comply with ASTM D7036-04 standards and a one time cost of about $4,000 to establish a quality CAIR monitoring program. A testing company can choose whether or not it will incur these certification costs, and if it chooses to perform this service, the company is expected to recover these costs from its customers.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect. In addition, the proposed rule is required by state and federal law in order to protect the environment and public health and safety.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking meets the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rulemaking does not, however, meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rules are an incorporation by reference of revisions to the federal CAIR. The commission previously adopted rules to incorporate the CAIR, as discussed elsewhere in this preamble. The CAIR includes EPA-administered emissions trading programs that will be governed by model rules provided in the CAIR, which states may incorporate by reference. The EPA found that Texas is among several states that contribute significantly to the nonattainment of the NAAQS for $PM_{2.5}$ in downwind states. The EPA is requiring upwind states to revise their SIPs to include control measures to reduce emissions of SO_2 and/or NO_x, which are both precursors to $PM_{2.5}$ formation. Reducing upwind precursor emissions will assist downwind $PM_{2.5}$ nonattainment areas to achieve the NAAQS in a more equitable, cost-effective manner than if those areas implemented local emission control strategies. The EPA has specified the amount of each state's required reductions, but each state has flexibility in how these reductions occur. If states choose to control EGUs, then they must establish a budget or cap for those sources. The CAIR defines the EGU budgets for the affected states if the states choose to control only EGUs or if they choose to control other sources to achieve some or all of their reductions. A state may adopt the CAIR NO_x model allowance allocation methodology or choose an alternative method to allocate the state budget of NO_x emissions allowances to sources in that state.

Specifically, the proposed rulemaking would incorporate by reference revisions to the CAIR model emissions trading rules located in 40 CFR Part 96, Subpart AA - Subpart II, and Subpart AAA - Subpart III. In addition, the rulemaking proposes revisions to an alternative NO_x allowance allocation methodology for Texas CAIR NO_x sources in lieu of the model rule methodology in 40 CFR Part 96, Subpart EE. The proposed rulemaking fulfills the requirements of SB 1672, enacted by the 80th Legislature, to incorporate CAIR by reference, including the five subsequent rule revisions that the EPA has promulgated to CAIR since Texas adopted the initial CAIR SIP revision on July 12, 2006, as well as revisions to the NO_x allocation methodology as prescribed by SB 1672. SB 1672 relates to correcting the number of minimum periods specified for NO_x allocation allowance readjustments that were directed by HB 2481. HB 2481 revised the baseline of existing units by reviewing heat-input data every five years by looking back at the three highest years of the previous seven years. However, the five-year period did not provide adequate time to accommodate the EPA's requirement of providing allocations to them approximately four years in advance of the applicable period. Therefore, the number of control periods was changed from seven to nine in SB 1672, and the allocation update was shifted from 2016 to 2018.

The incorporation of revisions to CAIR and the changes resulting from SB 1672 will allow CAIR to continue to be implemented in Texas, in accordance with the state statutory requirements. The proposed incorporation of the federal rule is intended to protect the environment and to reduce risks to human health and safety from environmental exposure by reducing NO_x and SO_2 emissions from upwind states so that downwind states may reach attainment of the NAAQS for $PM_{2.5}$. As discussed elsewhere in this preamble, the proposed revisions are not expected to impose significant costs on regulated entities. While continued implementation of the CAIR is intended to protect human health and the environment, it may adversely affect in a material way sources in the state that fall under the applicability requirements in the federal rule. Cost and benefits of the revisions to CAIR were analyzed by the EPA during the federal notice and comment rulemaking for the CAIR. CAIR is a required federal program, and the ability of states to modify the federal requirements is limited. Although CAIR was vacated by the United States Court of Appeals for the District of Columbia, it was not remanded. Therefore, its requirements remain in effect pending promulgation by the EPA of new rules to replace it. Because SB 1672 requires Texas to incorporate CAIR by reference, this proposed rulemaking would implement the CAIR requirements that are currently in effect.

The proposed rulemaking would implement requirements of the FCAA. Under 42 United States Code (USC), §7410(a)(2)(D), each SIP must contain adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment of the NAAQS

in any other state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (42 USC, Chapter 85, Air Pollution Prevention and Control). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule. Additionally, states have further obligations under 42 USC, §7410(a)(2)(D), to address interstate transport of pollutants that contribute significantly to nonattainment in, or interfere with maintenance by, another state. In the CAIR, the EPA found that 28 states and the District of Columbia contribute significantly to nonattainment of the $PM_{2.5}$ or eight-hour ozone NAAQS in downwind areas. The EPA is requiring these upwind states to revise their SIPs to include control measures to reduce emissions of SO_2 and/or NO_x, with limited flexibility. Adoption of the federal CAIR, including revisions and participation in its emissions cap and trade approach for annual SO_2 and NO_x emissions to reduce downwind $PM_{2.5}$ is the method Texas has chosen to achieve those reductions in a flexible and cost-effective manner.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by SB 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule is a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states have flexibility to develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the proposed rulemaking is to protect the environment and to reduce risks to human health by adoption of the revisions to the federal CAIR by reference in addition to changes resulting from SB 1672. The proposed rulemaking does not exceed a standard set by federal law nor exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this proposed rulemaking. Finally, this proposed rulemaking was not developed solely under the general powers of the agency but is required by THSC, TCAA, §382.0173. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because although the proposed rulemaking meets the definition of a "major environmental rule," it does not meet any of the four applicability criteria for a major environmental rule.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the proposed rulemaking is to incorporate by reference revisions to the federal CAIR emissions trading rules located in 40 CFR Part 96, Subpart AA - Subpart II and Subpart AAA - Subpart III, and to incorporate legislative changes during the 80th Texas Legislature as prescribed by SB 1672. In 2007, the 80th Texas Legislature passed SB 1672 that allows the commission to incorporate federal CAIR changes that the EPA has finalized since the initial adoption of the CAIR rules on July 12, 2006, and revise the NO_x allocation methodology as prescribed by SB 1672. SB 1672 revises the number of minimum periods specified for NO_x allowance allocation readjustments that was directed by HB 2481, as discussed elsewhere in this preamble. Additionally, the EPA promulgated several changes to the federal CAIR, as discussed elsewhere in this preamble. Although CAIR was vacated by the United States Court of Appeals for the District of Columbia, it has not been remanded, and therefore its requirements remain in effect pending the promulgation by the EPA of new rules to replace it. Because SB 1672 requires Texas to incorporate CAIR by reference, this proposed rulemaking would implement the CAIR requirements that are currently in effect. Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law and by state law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). The EPA promulgated the CAIR rule, and revisions to the CAIR, to reduce SO_2 and NO_x emissions from upwind states so that downwind states may reach attainment of the NAAQS for $PM_{2.5}$. The proposed rules will enable Texas to implement the federal emissions budget and trading program and impose its requirements on new and existing fossil fuel-fired electric utility units, ultimately ensuring reductions of SO_2 and NO_x emissions. The action will specifically advance the health and safety purpose by reducing $PM_{2.5}$ levels through an emissions cap and gradual reductions in emissions of SO_2 and NO_x. The rules specifically target a category of sources with significant SO_2 and NO_x emissions, and through the cap and trade program support cost-effective control strategies. Consequently, the proposed rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), concerning Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants are authorized and the proposed new rules will maintain at least the same level of or increase the level of emissions control as the existing rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.32). This rulemaking action complies with 40 CFR Part 51, concerning Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The requirements of 42 USC, §7410 are applicable requirements of 30 TAC Chapter 122. Facilities that are subject to the Federal Operating Permit Program will be required to obtain, revise, reopen, and renew their federal operating permits as appropriate in order to include CAIR.

ANNOUNCEMENT OF HEARINGS

Public hearings for this proposed rulemaking and SIP revision are scheduled in conjunction with the proposed repeal of the Clean Air Mercury Rule in Fort Worth on October 20, 2009, at 2:00 p.m. at the Texas Commission on Environmental Quality Regional Office, located at 2309 Gravel Drive; in Austin on October 21, 2009, at 2:00 p.m. in Building C, Room 131E at the Texas Commission on Environmental Quality complex, located at the commission's central office located at 12100 Park 35 Circle; and in Houston on October 22, 2009, at 2:00 p.m. in Conference Room A at the Houston-Galveston Area Council, located at 3555 Timmons Lane. Each hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Jessica Rawlings, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, MC 205, P.O. Box 13087, Austin, Texas 78711 or faxed to (512) 239-4808. All comments should reference Rule Project Number 2007-053-101-EN. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. The comment period closes October 26, 2009. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Brandon Greulich, Air Quality Planning Section, (512) 239-4904.

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.014, concerning Emission Inventory; §382.016, concerning Monitoring Requirements; §382.0173, concerning Adoption of Rules Regarding Certain State Implementation Plan Requirements and Standards of Performance for Certain Sources; and §382.054, concerning Federal Operating Permits; and FCAA, 42 USC, §§7401 *et seq*., which requires states to include in their adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment, or interfere with maintenance of, the national ambient air quality standard in any other state.

The proposed amendments implement THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, §382.0173, and §382.054; and FCAA, 42 USC, §§7401 *et seq*.

§101.502. Clean Air Interstate Rule Trading Program.

(a) The commission incorporates by reference, except as specified in this division, the provisions of 40 Code of Federal Regulations (CFR) Part 96, Subpart AA - Subpart II and Subpart AAA - Subpart III (as amended through October 19, 2007 (72 FR 59190)) [~~May 12, 2005 (70 FR 25162))~~] for purposes of implementing the Clean Air Interstate Rule (CAIR) trading programs for annual emissions of oxides of nitrogen (NO_x) and sulfur dioxide to meet the requirements of Federal Clean Air Act, §110(a)(2)(D).

(b) Owners and operators of sources subject to 40 CFR Part 96, Subpart AA - Subpart II or Subpart AAA - Subpart III shall comply with those requirements.

(c) The methodologies and procedures for determining and recording each subject source's CAIR NO_x [~~Clean Air Interstate Rule oxides of nitrogen~~] allowance allocation in 40 CFR Part 96, Subpart EE are replaced by the requirements of this division.

§101.504. Timing Requirements for Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations.

(a) The executive director shall submit to the United States Environmental Protection Agency (EPA) the Clean Air Interstate Rule (CAIR) oxides of nitrogen (NO_x) allowance allocations determined in accordance with §101.506(c) of this title (relating to Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations) by the following dates:

(1) October 31, 2006, for the 2009 - 2014 control periods;

(2) October 31, 2011, for the 2015 control period;

(3) October 31, 2012, [~~2014,~~] for the 2016 control period; and

(4) 38 [~~14~~] months prior to the beginning of each applicable control period for the control period beginning in 2017 and for each control period thereafter.

(b) For the control period beginning in 2009, and for each control period thereafter, the executive director shall submit to EPA the CAIR NO_x allowance allocations determined in accordance with §101.506(d) and (e) of this title by October 31 of the applicable control period.

[~~(c) If the executive director fails to submit to EPA the CAIR NO_x allowance allocations in accordance with subsection (a) of this section, EPA will assume that the allocations of CAIR NO_x allowances for the applicable control period are the same as for the control period that immediately precedes the applicable control period, except that, if the applicable control period is in 2015, EPA will assume that the allocations equal 83% of the allocations for the control period that immediately precedes the applicable control period.~~]

(c) [~~(d)~~] If the executive director fails to submit to EPA the CAIR NO_x allowance allocations in accordance with subsection (b) of this section, EPA will assume that no CAIR NO_x allowances are to be allocated, for the applicable control period, to any CAIR NO_x unit that would otherwise be allocated CAIR NO_x allowances under §101.506(d) and (e) of this title.

§101.506. Clean Air Interstate Rule Oxides of Nitrogen Allowance Allocations.

(a) For units commencing operation before January 1, 2001:

(1) for each control period in 2009 - 2017 [~~2015~~], the baseline heat input, in million British thermal units (MMBtu), is the average of the three highest amounts of the unit's adjusted control period heat input for 2000 - 2004 with the adjusted control period heat input for each year calculated as follows:

(A) if the unit is coal-fired during the year, the unit's control period heat input for such year is multiplied by 90%;

(B) if the unit is natural gas-fired during the year, the unit's control period heat input for such year is multiplied by 50%; and

(C) if the unit is not subject to subparagraph (A) or (B) of this paragraph, the unit's control period heat input for such year is multiplied by 30%.

(2) for the 2018 control period [~~beginning January 1, 2016,~~] and for the control period beginning every five years thereafter, the baseline heat input must be adjusted to reflect the average of the three highest amounts of the unit's adjusted control period heat input from control periods one through five of the preceding nine [~~seven~~] control periods with the adjusted control period heat input for each year calculated as follows:

(A) if the unit is coal-fired during the year, the unit's control period heat input for such year is multiplied by 90%;

(B) if the unit is natural gas-fired during the year, the unit's control period heat input for such year is multiplied by 50%; and

(C) if the unit is not subject to subparagraph (A) or (B) of this paragraph, the unit's control period heat input for such year is multiplied by 30%.

(b) For units commencing operation on or after January 1, 2001:

(1) for each control period in 2009 - 2014, Clean Air Interstate Rule (CAIR) oxides of nitrogen (NO_x) allowances must be allocated from the new unit set-aside identified under §101.503(b) of this title (relating to Clean Air Interstate Rule Oxides of Nitrogen Annual

Trading Budget) and determined in accordance with subsection (d) of this section;

(2) for the 2015, 2016, and 2017 control periods, [~~period beginning January 1, 2015~~] for units operating each calendar year during a period of five or more consecutive years, the baseline heat input is the average of the three highest amounts of the unit's total converted control period heat input over the first such five years. The converted control period heat input for each year is calculated as follows:

(A) except as provided in subparagraph (B) or (C) of this paragraph, the converted control period heat input equals the control period gross electrical output of the generator or generators served by the unit multiplied by 7,900 British thermal units per kilowatt-hour (Btu/kWh), if the unit is coal-fired for the year, or 6,675 Btu/kWh, if the unit is not coal-fired for the year, and divided by 1,000,000 Btu/MMBtu. If a generator is served by two or more units, then the gross electrical output of the generator must be attributed to each unit in proportion to the unit's share of the total control period heat input of such units for the year;

(B) for a unit that is a boiler and has equipment used to produce electricity and useful thermal energy for industrial, commercial, heating, or cooling purposes through the sequential use of energy, the converted heat input is the total heat energy (in Btu) of the steam produced by the boiler during the control period, divided by 0.8 and converted to MMBtu by dividing by 1,000,000 Btu/MMBtu; or

(C) for a unit that is a combustion turbine and has equipment used to produce electricity and useful thermal energy for industrial, commercial, heating, or cooling purposes through the sequential use of energy, the converted heat input is determined using the equation in the following figure.
Figure: 30 TAC §101.506(b)(2)(C) (No change.)

(3) for the 2018 control period [~~beginning January 1, 2016,~~] and for the control period beginning every five years thereafter, for units operating each calendar year during a period of five or more consecutive years, the baseline heat input must [~~shall~~] be adjusted to reflect the average of the three highest amounts of the unit's converted control period heat input from control periods one through five of the preceding nine [~~seven~~] control periods. The converted control period heat input for each year is calculated as follows:

(A) except as provided in subparagraph (B) or (C) of this paragraph, the converted control period heat input equals the control period gross electrical output of the generator or generators served by the unit multiplied by 7,900 Btu/kWh, if the unit is coal-fired for the year, or 6,675 Btu/kWh, if the unit is not coal-fired for the year, and divided by 1,000,000 Btu/MMBtu, provided that if a generator is served by two or more units, then the gross electrical output of the generator must be attributed to each unit in proportion to the unit's share of the total control period heat input of such units for the year;

(B) for a unit that is a boiler and has equipment used to produce electricity and useful thermal energy for industrial, commercial, heating, or cooling purposes through the sequential use of energy, the converted control period heat input equals the total heat energy (in Btu) of the steam produced by the boiler during the control period, divided by 0.8 and converted to MMBtu by dividing by 1,000,000 Btu/MMBtu; or

(C) for a unit that is a combustion turbine and has equipment used to produce electricity and useful thermal energy for industrial, commercial, heating, or cooling purposes through the sequential use of energy, the converted control period heat input is determined using the equation in the following figure.
Figure: 30 TAC §101.506(b)(3)(C) (No change.)

(c) For units with a baseline heat input calculated under subsection (a) or (b)(2) or (3) of this section, CAIR NO_x allowances must be allocated according to the equation in the following figure.
Figure: 30 TAC §101.506(c) (No change.)

(d) For units commencing operation on or after January 1, 2001, and that have not established a baseline heat input in accordance with subsection (b)(2) or (3) of this section, CAIR NO_x allowances must be allocated according to the following.

(1) Beginning with the later of the control period in 2009 or the first control period after the control period in which the CAIR NO_x unit commences commercial operation and until the first control period for which the unit is allocated CAIR NO_x allowances under subsection (c) of this section, CAIR NO_x allowances must be allocated from the new unit set-aside identified under §101.503(b) of this title. For the first control period in which a CAIR NO_x unit commences commercial operation, such CAIR NO_x unit will not receive a CAIR NO_x allocation from the new unit set-aside.

(2) To receive a CAIR NO_x allowance allocation from the new unit set-aside, the CAIR designated representative shall submit to the executive director a written request on or before May 1 [~~July 1~~] of the first control period for which the CAIR NO_x allowance allocation is requested and after the date that the CAIR NO_x unit commences commercial operation.

(3) In a CAIR NO_x allowance allocation request under paragraph (2) of this subsection, the amount of CAIR NO_x allowances requested for a control period must not exceed the CAIR NO_x unit's total tons of NO_x emissions reported to EPA for the calendar year immediately preceding such control period.

(4) The executive director shall review each CAIR NO_x allowance allocation request submitted in accordance with this subsection and shall allocate CAIR NO_x allowances for each control period as follows.

(A) The executive director shall accept a CAIR NO_x allowance allocation request only if the request meets, or is adjusted as necessary to meet, the requirements of this subsection.

(B) On or after May 1 [~~July 1~~] of the control period, the executive director shall determine the sum of all accepted CAIR NO_x allowance allocation requests for the control period.

(C) If the amount of CAIR NO_x allowances in the new unit set-aside for the control period is greater than or equal to the sum under subparagraph (B) of this paragraph, then the executive director shall allocate the full amount of CAIR NO_x allowances requested to each CAIR NO_x unit covered under a CAIR NO_x allowance allocation request that was accepted by the executive director.

(D) If the amount of CAIR NO_x allowances in the new unit set-aside for the control period is less than the sum under subparagraph (B) of this paragraph, then the executive director shall allocate CAIR NO_x allowances to each CAIR NO_x unit covered under a CAIR NO_x allowance allocation request accepted by the executive director according to the equation in the following figure.
Figure: 30 TAC §101.506(d)(4)(D) (No change.)

(E) The executive director shall notify each CAIR designated representative who submitted a CAIR NO_x allowance allocation request of the amount of CAIR NO_x allowances, if any, allocated for the control period to the CAIR NO_x unit covered under the request.

(e) If, after completion of the procedures under subsection (d) of this section for a control period, any unallocated CAIR NO_x allowances remain in the new unit set-aside for the control period, the executive director shall allocate to each CAIR NO_x unit receiving an

allocation under subsection (c) of this section an amount of CAIR NO_x allowances equal to the total amount of such remaining unallocated CAIR NO_x allowances, multiplied by the unit's allocation under subsection (c) of this section, divided by 90.5% of the NO_x trading budget identified in subsection (a) of this section, and rounded to the nearest whole allowance as appropriate.

(f) A unit's control period heat input, and a unit's status as coal-fired or natural gas-fired, for a calendar year under subsection (a) of this section, and a unit's total tons of NO_x emissions during a calendar year under subsection (d) of this section, must be determined in accordance with 40 Code of Federal Regulations (CFR) Part 75, to the extent the unit was otherwise subject to the requirements of 40 CFR Part 75 for the year, or must be based on the best available data reported to the executive director for the unit, to the extent the unit was not otherwise subject to the requirements of 40 CFR Part 75 for the year.

(g) On or before the latter of May 1, 2011, [~~July 1, 2011,~~] or May 1 [~~July 1~~] of the control period immediately following a unit's fifth [~~complete,~~] consecutive year of commercial operation, the CAIR designated representative of a unit establishing a baseline heat input in accordance with subsection (b)(2) or (3) of this section shall submit, on a form specified by the executive director, written certification of the gross electrical output of the generator or generators served by the unit and the total heat energy of any steam produced by the unit during the first five years of commercial operation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 11, 2009.

TRD-200903994
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 239-0177

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DIVISION 8. CLEAN AIR MERCURY RULE

30 TAC §101.601, §101.602

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Commission on Environmental Quality (commission) proposes the repeal of §101.601 and §101.602.

The commission will notify the United States Environmental Protection Agency (EPA) of the withdrawal of the Texas State Plan for the Control of Designated Facilities and Pollutants, Plan for Control of Mercury Emissions from Coal-Fired Electric Steam Generating Units, Clean Air Mercury Rule (CAMR), adopted on July 12, 2006.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED REPEALS

On May 18, 2005, the EPA finalized CAMR to permanently cap and reduce mercury (Hg) emissions from new and existing coal-fired electric generating units (EGU) nationwide. The EPA provided states with two compliance options for meeting the reduction requirements under CAMR: 1) meet the state's emission budget by requiring new and existing coal-fired EGUs to participate in an EPA-administered cap and trade system; or 2) meet an individual state emissions budget through measures of the state's choosing.

The CAMR model trading rule, under 40 Code of Federal Regulations (CFR) Part 60, Subpart HHHH, was a market-based cap and trade system designed to reduce the costs of complying with the new Hg reduction requirements. The Mercury Budget Trading Program capped nationwide annual Hg emissions by providing each state with an annual emissions budget to be applied to all coal-fired boilers and turbines serving an electrical generator with a nameplate capacity greater than 25 megawatts of electricity (MWe) and producing electricity for sale. The trading rule provided flexibility in complying with the Hg reduction requirements through unrestricted banking of excess allowances and the trading of allowances between EGUs nationwide. States participating in the interstate trading program therefore were not subject to individual state caps. Under the model rule, states were provided flexibility in the allocation methodology used to determine Hg allowance allocations for each Hg budget unit. States were then responsible for submitting the allowance allocations to the EPA. Under the CAMR model rule, the EPA established Hg compliance accounts for each Hg budget source and maintained an allowance tracking system to record the deposit, transfer, and deduction for compliance of all Hg allowances. The Hg budget sources were required, under the model rule, to demonstrate compliance through the installation and operation of continuous emissions monitoring systems as required under 40 CFR Part 75. Also, the model rule required all elements of the Mercury Budget Trading Program to be federally enforceable through the issuance of an Hg budget permit as a complete and separable portion of each Hg budget source's Title V permit.

The 79th Legislature, 2005, enacted House Bill (HB) 2481 amending Texas Health and Safety Code (THSC), Chapter 382 by adding §382.0173, requiring Texas to participate in the EPA-administered interstate cap and trade programs through the incorporation by reference of 40 CFR Part 96, Subparts AA - II and Subparts AAA - III (regarding Clean Air Interstate Rule (CAIR)), and Part 60, Subpart HHHH (regarding CAMR).

THSC, §382.0173(d) provided that its provisions applied ". . . only while the federal rules cited in this section are enforceable . . ." and that the provisions of HB 2481 do ". . . not limit the authority of the commission to implement more stringent emissions control requirements." The commission interpreted the language of THSC, §382.0173(d) as not restricting existing authority to require further emissions control requirements, but not to interfere with, or change, the requirements of CAIR nitrogen oxides and sulfur dioxide, or the CAMR Hg emission trading programs. The legislature expressed clear intent that the commission implements the CAIR and CAMR emission trading programs by requiring the incorporation by reference of the CAIR and CAMR program rules as promulgated by the EPA and requiring the use of EPA-specified allocation methodology, with some exceptions for CAIR nitrogen oxides allowances.

On June 9, 2006, the EPA finalized revisions to the CAMR rule reducing the Phase I Texas Hg budget from 4.657 to 4.656 tons of Hg per year, or a reduction of two pounds of Hg per year from the Phase I Texas Hg budget. The revisions also included clarification to the applicability of CAMR to municipal waste com-

busters and certain industrial boilers. New source performance standards were also clarified in this revision. For additional information regarding these revisions, please see the EPA final rule, published in the June 9, 2006, issue of the *Federal Register* (71 FR 33388), available online at *www.epa.gov/fedrgstr/*.

On July 12, 2006, the commission adopted Chapter 101, General Air Quality Rules, Subchapter H, Emissions Banking and Trading, Division 8, Clean Air Mercury Rule. The adoption of this rule required all EGUs meeting the applicability requirements of 40 CFR §60.4104 to be part of the CAMR trading program. The allocation methodology stated in 40 CFR §60.4142 (issued on May 12, 2005) was used to determine the Hg allowance allocations. From 2010 through 2014 (Phase I), the Texas Hg budget was 4.657 tons of Hg per year, then reduced starting in 2015 and thereafter (Phase II) to 1.838 tons of Hg per year.

The 80th Legislature, 2007, enacted Senate Bill (SB) 1672 amending THSC, Chapter 382. SB 1672 omitted the reference dates specified by HB 2481 enabling the commission to make subsequent changes as dictated by federal rule changes to CAMR.

On October 11, 2007, the EPA finalized additional revisions to the CAIR and CAMR rule, updating the definition of a cogeneration unit, technical corrections, and included other minor revisions. For additional information regarding these revisions, please see the EPA final rule, published in the October 19, 2007, issue of the *Federal Register* (72 FR 59190) available online at *www.epa.gov/fedrgstr/*.

On February 8, 2008, the United States Court of Appeals District of Columbia Circuit vacated CAMR (Number 05-1097) finding that the EPA did not follow the procedure set forth to remove EGUs from the requirements of the Federal Clean Air Act (FCAA), §112. Therefore, the emissions from EGUs could not be regulated under FCAA, §111 and a cap and trade system could not be implemented for controlling Hg emissions from oil-fired and coal-fired EGUs. On October 17, 2008, the EPA requested the United States Supreme Court to review the case. However, on February 6, 2009, the Department of Justice filed a motion on behalf of the EPA to dismiss the EPA's request to review the case stating that the EPA decided to develop appropriate standards to regulate power plant emissions under FCAA, §112. On February 23, 2009, the United States Supreme Court decided not to hear the case. This officially vacated CAMR at the federal level; therefore, the state CAMR rule, incorporated by reference, and state plan are longer applicable or necessary.

SECTION BY SECTION DISCUSSION

The proposed rulemaking repeals §101.601 and §101.602 since the federal references cited in these sections are no longer valid. Section 101.601, Applicability, incorporated by reference the applicability requirements of 40 CFR §60.4104. Section 101.602, Clean Air Mercury Rule Trading Rule, incorporated by reference 40 CFR Part 60, Subpart HHHH.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state government as a result of administration or enforcement of the proposed rules. Local governments that own or operate coal-fired EGUs are anticipated to experience cost savings due to the vacation of federal rules regarding Hg emissions.

The federal CAMR rule was vacated on February 8, 2008, in the United States Court of Appeals, District of Columbia Circuit, and the United States Supreme Court declined to hear the case on February 23, 2009. Because the federal CAMR rule was vacated, the proposed rules repeal the state CAMR rule.

The vacated federal CAMR rule would have required EGUs to either purchase emission allowances or install additional controls. Cost estimates to purchase allowances ranged from $1,500 per ounce to $2,400 per ounce depending on market price and the year of purchase. Control cost estimates varied widely depending on the control and the progressive requirement to lower Hg and sulfur dioxide emissions. Flue gas desulfurization controls to eliminate 30% to 40% of Hg emissions in Phase I of the vacated federal CAMR rule were estimated to cost $400 to $800 per ton. Phase II controls were more complicated and expensive.

Repeal of the federal CAMR rule eliminates the need for coal-fired power plants to purchase allowances or add additional controls to reduce Hg emissions. Staff has estimated that as many as 36 EGUs statewide (four owned by local governments and 32 owned by large businesses) will no longer be required to either purchase emission allowances or install additional controls.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be consistency with federal rules, which will reduce confusion within the regulated community.

No immediate fiscal implications are anticipated for businesses or individuals as a result of the implementation of the proposed rules, but future cost savings would be anticipated. The proposed repeal of the state CAMR rule will eliminate the need for approximately 32 coal-fired power plants owned by large businesses to purchase allowances or add additional controls to reduce Hg emissions.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. Typically, small businesses do not own or operate EGUs, and the repeal of the state CAMR rule is not expected to affect the operations of small businesses.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with federal regulations and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this proposed repeal in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed repeal does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking would repeal rules that incorporate by reference the federal CAMR emissions trading rules located in 40 CFR Part 60, Subpart HHHH. 42 United States Code (USC), §7411 created a system for the establishment of standards of performance to reduce emissions from stationary sources. The rules were originally adopted to fulfill the requirements of HB 2481 to incorporate CAMR by reference and to specify the sources to which the trading program is applicable. Since the adoption of these rules, however, CAMR has been overturned by the United States Court of Appeals for the District of Columbia. The United States Supreme Court declined to hear an appeal of this decision, rendering the overturn final. Therefore, CAMR has been invalidated by the courts and is no longer an enforceable federal requirement. The repeal of the state CAMR rule incorporating the federal CAMR requirements does not meet the definition of a "major environmental rule," and therefore a regulatory impact analysis is not required under Texas Government Code, §2001.0225.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the proposed rulemaking is to repeal rules that incorporated by reference the federal CAMR emissions trading rules, located in 40 CFR Part 60, Subpart HHHH. Subpart HHHH established a Hg emissions cap and trade program for new and existing coal-fired EGUs for which standards of performance were promulgated under 42 USC, §7411. During the 79th Legislature, 2005, the legislature enacted HB 2481, which created a requirement in the Texas Clean Air Act, codified in THSC, §382.0173, to adopt the federal program rules by reference. Since the adoption of these rules, however, CAMR has been overturned by the United States Court of Appeals for the District of Columbia. The United States Supreme Court has declined to hear an appeal of this decision, rendering it final. Therefore, CAMR has been invalidated by the courts and is no longer an enforceable federal requirement. Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this proposed rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law and by state law.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

ANNOUNCEMENT OF HEARINGS

Public hearings for this proposed rulemaking are scheduled in conjunction with the proposed rule and SIP revisions to CAIR in Fort Worth on October 20, 2009, at 2:00 p.m. at the Texas Commission on Environmental Quality Regional Office, located at 2309 Gravel Drive; in Austin on October 21, 2009, at 2:00 p.m. in Building C, Room 131E at the Texas Commission on Environmental Quality complex, located at the commission's central office located at 12100 Park 35 Circle; and in Houston on October 22, 2009, at 2:00 p.m. in Conference Room A at the Houston-Galveston Area Council, located at 3555 Timmons Lane. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearings.

Persons who have special communication or other accommodation needs who are planning to attend a hearing should contact Michael Parrish, Office of Legal Services at (512) 239-2548. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Michael Parrish, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2007-054-101-EN. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. The comment period closes October 26, 2009. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Brandon Greulich, Air Quality Planning Section, (512) 239-4904.

STATUTORY AUTHORITY

The repeals are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeals are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.014, concerning Emission Inventory; §382.016, concerning Monitoring Requirements; House Bill 2481, §2, codified in THSC, §382.0173, concerning Adoption of Rules Regarding Certain SIP Requirements and Standards of Performance for Certain Sources; §382.054, concerning Federal Operating Permit; and Federal Clean Air Act (FCAA), 42 USC, §§7401 *et seq*., which requires states to submit plans establishing standards of performance for existing sources of pollutants for which National Ambient Air Quality Standards

have not been established and providing for the implementation and enforcement of such standards of performance.

The proposed repeals implement THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.0173, and 382.054, and FCAA, 42 USC, §§7401 *et seq*.

§101.601. Applicability.
§101.602. Clean Air Mercury Rule Trading Program.
This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 11, 2009.

TRD-200903996
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 239-2548

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CHAPTER 122. FEDERAL OPERATING PERMITS PROGRAM

The Texas Commission on Environmental Quality (commission) proposes amendments to §§122.10, 122.12, and 122.120; and the repeal of §§122.440, 122.442, 122.444, 122.446, and 122.448.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

On May 18, 2005, the United States Environmental Protection Agency (EPA) finalized the Clean Air Mercury Rule (CAMR) to permanently cap and reduce mercury emissions from new and existing coal-fired electric generating units (EGU) nationwide. From 2010 through 2017 (Phase I), the annual mercury budget for Texas is 4.656 tons per year, then reduces to 1.838 tons per year starting in 2018 and beyond (Phase II).

The 79th Legislature, 2005, enacted House Bill (HB) 2481, amending Texas Health and Safety Code (THSC), Chapter 382 by adding §382.0173, which requires Texas to participate in the EPA-administered interstate cap and trade program through the incorporation by reference of Title 40 Code of Federal Regulations (CFR) Part 96, Subparts AA - II and Subparts AAA - III (regarding Clean Air Interstate Rule (CAIR)), and Part 60, Subpart HHHH (regarding CAMR). Section 382.0173(d) also states that "This section applies only while the federal rules cited in this section are enforceable and does not limit the authority of the commission to implement more stringent emissions control requirements."

The 80th Legislature, 2007, enacted Senate Bill (SB) 1672, amending THSC, Chapter 382. The addition of THSC, §382.0173(e)(3), directs the commission to incorporate EPA final rulemaking action into state rules for both CAIR and CAMR.

Several petitions were filed against CAMR, and on February 8, 2008, the United States Court of Appeals, District of Columbia Circuit (Number 05-1097) vacated CAMR. The EPA petitioned the United States Supreme Court to review the decision. On February 23, 2009, the United States Supreme Court declined to hear the case. This officially vacates CAMR at the federal level. The state rules and plan submitted to the EPA for CAMR are no longer valid. Additionally, facilities formerly subject to CAMR may now be subject to a case-by-case Maximum Achievable Control Technology determination for mercury.

Therefore, the proposed amendments and repealed sections remove the state rules that implement CAMR. The commission will notify the EPA of the withdrawal of the Texas State Plan for the Control of Designated Facilities and Pollutants, Plan for Control of Mercury Emissions from Coal-Fired Electric Steam Generating Units, Clean Air Mercury Rule (CAMR), adopted on July 12, 2006.

SECTION BY SECTION DISCUSSION

Subchapter A: Definitions

§122.10 - General Definitions

The commission is proposing to remove the phrase "Clean Air Mercury Rule" from §122.10(2)(I)(iii) because the CAMR was vacated by the United States Court of Appeals, District of Columbia Circuit.

§122.12 - Acid Rain, Clean Air Interstate Rule, and Clean Air Mercury Rule Definitions

The commission is proposing to remove the phrase "Clean Air Mercury Rule" from the title of this section and §122.12(5), Mercury budget permit, since the federal requirements have been vacated by the United States Court of Appeals, District of Columbia Circuit.

Subchapter B: Permit Requirements

Division 1: General Requirements

§122.120 - Applicability

The commission is proposing to remove §122.120(a)(7) from this section because it requires mercury budget units, as defined by the vacated rule, to have a federal operating permit.

Subchapter E: Acid Rain Permits, Clean Air Interstate Rule, Clean Air Mercury Rule

Division 3: Clean Air Mercury Rule

§122.440 - General Mercury Budget Trading Program Permit Requirements

The commission is proposing to repeal this section because the United States Court of Appeals, District of Columbia Circuit has vacated the underlying federal regulation.

§122.442 - Submission of Mercury Budget Permit Applications

The commission is proposing to repeal this section because the United States Court of Appeals, District of Columbia Circuit has vacated the underlying federal regulation.

§122.444 - Information Requirements for Mercury Budget Permit Applications

The commission is proposing to repeal this section because the United States Court of Appeals, District of Columbia Circuit has vacated the underlying federal regulation.

§122.446 - Mercury Budget Permit Contents and Term

The commission is proposing to repeal this section because the United States Court of Appeals District of Columbia Circuit has vacated the underlying federal regulation.

§122.448 - Mercury Budget Permit Revisions

The commission is proposing to repeal this section because the United States Court of Appeals District of Columbia Circuit has vacated the underlying federal regulation.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state government as a result of administration or enforcement of the proposed rules. Local governments that own or operate coal-fired EGUs are anticipated to request a revision to remove CAMR requirements from their permits, but any such request is not expected to have a significant fiscal impact on these local governments.

The federal CAMR rule was vacated on February 8, 2008, in the United States Court of Appeals, District of Columbia Circuit, and the United States Supreme Court declined to hear the case on February 23, 2009. Because the federal CAMR rule was vacated, the proposed rules repeal the Texas CAMR. The repeal of the Texas CAMR affects 30 TAC, Chapters 101 and 122. The fiscal impact of the repeal of Chapter 101, Subchapter H, Division 8 is detailed in a separate fiscal note. This fiscal note pertains to the repeal of requirements for permit applications for CAMR found in certain sections of Chapter 122, which pertain to Title V permits.

Repeal of CAMR permitting requirements will not have a significant fiscal impact on regulated entities. Although there are potential cost savings for facilities that will no longer have to comply with CAMR requirements, no mercury credits were generated so it is not possible to quantify savings. The process to request the removal of CAMR requirements from permits is expected to be a relatively uncomplicated process, and regulated entities should not incur significant additional costs when making the request. No permit fees will be charged to process these Title V permit modifications. Staff estimates that there may be as many as 36 EGUs statewide at 18 sites (four units owned by local governments at three sites and 32 units at 15 sites owned by large businesses) that may request permit revision to remove CAMR requirements from their permits.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with federal law.

No fiscal implications are anticipated for individuals and no significant fiscal implications are anticipated for businesses as a result of the implementation of the proposed rules. The proposed repeal of the Texas CAMR will allow 32 coal-fired power plants owned by large businesses at 15 sites to request the removal of CAMR requirements from their permits. These businesses should not incur significant additional costs when requesting a permit modification to remove CAMR requirements, and no permit fees will be charged to process these permit modifications.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. Typically, small businesses do not own or operate EGUs, and the repeal of the Texas CAMR is not expected to affect the operations of small businesses.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with federal regulations and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the amendments and repealed sections in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposal does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking would amend and repeal rules that incorporate by reference the federal CAMR emissions trading rules located in 40 CFR Part 60, Subpart HHHH. 42 United States Code (USC), §7411 created a system for the establishment of standards of performance to reduce emissions from stationary sources. The rules were originally adopted to fulfill the requirements of HB 2481 to incorporate CAMR by reference and to specify the sources to which the trading program is applicable. Since the adoption of the CAMR rule, however, CAMR has been overturned by the United States Court of Appeals for the District of Columbia. The United States Supreme Court declined to hear an appeal of this decision, rendering the overturn final. Therefore, CAMR has been invalidated by the courts and is no longer an enforceable federal requirement. The repeal of the state CAMR rule incorporating the federal CAMR requirements does not meet the definition of a "major environmental rule," and therefore a regulatory impact analysis is not required under Texas Government Code, §2001.0225.

Comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the proposed rulemaking is to repeal rules that incorporated by reference the federal CAMR emissions trading rules, located in 40 CFR Part 60, Subpart HHHH. Subpart HHHH established a mercury emissions cap and trade program for new and existing coal-fired EGUs, for which standards of performance were promulgated under 42 USC, §7411. During the 79th Legislature, 2005, the legislature enacted HB 2481, which created a requirement in the Texas Clean Air Act, codified in THSC, §382.0173, to adopt the federal program rules by reference. Since the adoption of the CAMR rules, however, CAMR has been overturned by the United States Court of Appeals for the

District of Columbia. The United States Supreme Court has declined to hear an appeal of this decision, rendering it final. Therefore, CAMR has been invalidated by the courts and is no longer an enforceable federal requirement. Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this proposed rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law and by state law.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

With these proposed changes to Chapter 122, the owners or operators of facilities subject to the federal operating permits program that have been issued permits with CAMR requirements would have the option of initiating a permit action to remove these requirements or waiting for the next permit action, such as a renewal, to remove these requirements.

ANNOUNCEMENT OF HEARINGS

The commission will hold a public hearing on this proposal in Fort Worth on October 20, 2009, at 2:00 p.m. at the Texas Commission on Environmental Quality Regional Office, located at 2309 Gravel Drive; in Austin on October 21, 2009, at 2:00 p.m. in Building C, Room 131E at the Texas Commission on Environmental Quality complex, located at the commission's central office located at 12100 Park 35 Circle; and in Houston on October 22, 2009, at 2:00 p.m. in Conference Room A at the Houston-Galveston Area Council, located at 3555 Timmons Lane. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearings.

Persons who have special communication or other accommodation needs who are planning to attend a hearing should contact Michael Parrish, Office of Legal Services at (512) 239-2548. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2007-054-101-EN. The comment period closes October 26, 2009. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Brandon Greulich, Air Quality Planning Section, (512) 239-4904.

SUBCHAPTER A. DEFINITIONS

30 TAC §122.10, §122.12

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.014, concerning Emission Inventory; §382.016, concerning Monitoring Requirements; House Bill 2481, §2, codified in THSC, §382.0173, concerning Adoption of Rules Regarding Certain SIP Requirements and Standards of Performance for Certain Sources; §382.054, concerning Federal Operating Permit; and Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq.,* which requires states to submit plans establishing standards of performance for existing sources of pollutants for which National Ambient Air Quality Standards have not been established and providing for the implementation and enforcement of such standards of performance.

The proposed amendments implement THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.0173, and 382.054, and FCAA, 42 USC, §§7401 *et seq.*

§122.10. General Definitions.

The definitions in the Texas Clean Air Act, Chapter 101 of this title (relating to General Air Quality Rules), and Chapter 3 of this title (relating to Definitions) apply to this chapter. In addition, the following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Air pollutant--Any of the following regulated air pollutants:

(A) nitrogen oxides;

(B) volatile organic compounds;

(C) any pollutant for which a national ambient air quality standard has been promulgated;

(D) any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA), §111 (Standards of Performance for New Stationary Sources);

(E) unless otherwise specified by the United States Environmental Protection Agency (EPA) by rule, any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI (Stratospheric Ozone Protection); or

(F) any pollutant subject to a standard promulgated under FCAA, §112 (Hazardous Air Pollutants) or other requirements established under §112, including §112(g), (j), and (r), including any of the following:

(i) any pollutant subject to requirements under FCAA, §112(j). If the EPA fails to promulgate a standard by the date

established under FCAA, §112(e), any pollutant for which a subject site would be major shall be considered to be regulated on the date 18 months after the applicable date established under FCAA, §112(e); and

(ii) any pollutant for which the requirements of FCAA, §112(g)(2) have been met, but only with respect to the individual site subject to FCAA, §112(g)(2) requirement.

(2) Applicable requirement--All of the following requirements, including requirements that have been promulgated or approved by the United States Environmental Protection Agency (EPA) through rulemaking at the time of issuance but have future-effective compliance dates:

(A) all of the requirements of Chapter 111 of this title (relating to Control of Air Pollution From Visible Emissions and Particulate Matter) as they apply to the emission units at a site;

(B) all of the requirements of Chapter 112 of this title (relating to Control of Air Pollution from Sulfur Compounds) as they apply to the emission units at a site;

(C) all of the requirements of Chapter 113 of this title (relating to Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants), as they apply to the emission units at a site;

(D) all of the requirements of Chapter 115 of this title (relating to Control of Air Pollution from Volatile Organic Compounds) as they apply to the emission units at a site;

(E) all of the requirements of Chapter 117 of this title (relating to Control of Air Pollution From Nitrogen Compounds) as they apply to the emission units at a site;

(F) the following requirements of Chapter 101 of this title (relating to General Air Quality Rules):

(i) Chapter 101, Subchapter A of this title (relating to General Rules), §101.1 of this title (relating to Definitions), insofar as the terms defined in this section are used to define the terms used in other applicable requirements;

(ii) Chapter 101, Subchapter A, §101.3 and §101.10 of this title (relating to Circumvention; and Emissions Inventory Requirements);

(iii) Chapter 101, Subchapter A, §101.8 and §101.9 of this title (relating to Sampling; and Sampling Reports) if the commission or the executive director has requested such action;

(iv) Chapter 101, Subchapter F of this title (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities), §§101.201, 101.211, 101.221, 101.222, and 101.223 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements; Operational Requirements; Demonstrations; and Actions to Reduce Excessive Emissions); and

(v) Chapter 101, Subchapter H of this title (relating to Emissions Banking and Trading) as it applies to the emission units at a site;

(G) any site-specific requirement of the state implementation plan;

(H) all of the requirements under Chapter 106, Subchapter A of this title (relating to Permits by Rule), or Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) and any term or condition of any preconstruction permit;

(I) all of the following federal requirements as they apply to the emission units at a site:

(i) any standard or other requirement under Federal Clean Air Act (FCAA), §111 (Standards of Performance for New Stationary Sources);

(ii) any standard or other requirement under FCAA, §112 (Hazardous Air Pollutants);

(iii) any standard or other requirement of the Acid Rain or[~~,~~] Clean Air Interstate Rule[~~, or Clean Air Mercury Rule~~] Programs;

(iv) any requirements established under FCAA, §504(b) or §114(a)(3) (Monitoring and Analysis or Inspections, Monitoring, and Entry);

(v) any standard or other requirement governing solid waste incineration under FCAA, §129 (Solid Waste Combustion);

(vi) any standard or other requirement for consumer and commercial products under FCAA, §183(e) (Federal Ozone Measures);

(vii) any standard or other requirement under FCAA, §183(f) (Tank Vessel Standards);

(viii) any standard or other requirement under FCAA, §328 (Air Pollution from Outer Continental Shelf Activities);

(ix) any standard or other requirement under FCAA, Title VI (Stratospheric Ozone Protection), unless EPA has determined that the requirement need not be contained in a permit; and

(x) any increment or visibility requirement under FCAA, Title I, Part C or any national ambient air quality standard, but only as it would apply to temporary sources permitted under FCAA, §504(e) (Temporary Sources); and

(J) the following are not applicable requirements under this chapter, except as noted in subparagraph (I)(x) of this paragraph:

(i) any state or federal ambient air quality standard;

(ii) any net ground level concentration limit;

(iii) any ambient atmospheric concentration limit;

(iv) any requirement for mobile sources;

(v) any asbestos demolition or renovation requirement under 40 Code of Federal Regulations (CFR) Part 61, Subpart M (National Emissions Standards for Asbestos);

(vi) any requirement under 40 CFR Part 60, Subpart AAA (Standards of Performance for New Residential Wood Heaters); and

(vii) any state only requirement (including §111.131 of this title (relating to Definitions), §111.133 of this title (relating to Testing Requirements), §111.135 of this title (relating to Control Requirements for Surfaces with Coatings Containing Lead), §111.137 of this title (relating to Control Requirements for Surface Coatings containing less than 1.0% Lead), and §111.139 of this title (relating to Exemptions).

(3) Continuous compliance determination method--For purposes of Subchapter G of this chapter (relating to Periodic Monitoring and Compliance Assurance Monitoring), a method, specified by an applicable requirement, which satisfies the following criteria:

(A) the method is used to determine compliance with an emission limitation or standard on a continuous basis consistent with the averaging period established for the emission limitation or standard; and

(B) the method provides data either in units of the emission limitation or standard or correlated directly with the emission limitation or standard.

(4) Control device--For the purposes of compliance assurance monitoring applicability, specified in §122.604 of this title (relating to Compliance Assurance Monitoring Applicability), the control device definition specified in 40 Code of Federal Regulations Part 64, concerning Compliance Assurance Monitoring, applies.

(5) Deviation--Any indication of noncompliance with a term or condition of the permit as found using compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit and any other credible evidence or information.

(6) Deviation limit--A designated value(s) or condition(s) which establishes the boundary for an indicator of performance. Operation outside of the boundary of the indicator of performance shall be considered a deviation.

(7) Draft permit--The version of a permit available for the 30-day comment period under public announcement or public notice and affected state review. The draft permit may be the same document as the proposed permit.

(8) Emission unit--A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a point of origin of air pollutants, including appurtenances.

(A) A point of origin of fugitive emissions from individual pieces of equipment, e.g., valves, flanges, pumps, and compressors, shall not be considered an individual emission unit. The fugitive emissions shall be collectively considered as an emission unit based on their relationship to the associated process.

(B) The term may also be used in this chapter to refer to a group of similar emission units.

(C) This term is not meant to alter or affect the definition of the term "unit" for purposes of the Acid Rain Program.

(9) Federal Clean Air Act, §502(b)(10) changes--Changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene federally enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

(10) Final action--Issuance or denial of the permit by the executive director.

(11) General operating permit--A permit issued under Subchapter F of this chapter (relating to General Operating Permits), under which multiple similar stationary sources may be authorized to operate.

(12) Large pollutant-specific emission unit--An emission unit with the potential to emit, taking into account control devices, the applicable air pollutant in an amount equal to or greater than 100% of the amount, in tons per year, required for a source to be classified as a major source, as defined in this section.

(13) Major source--

(A) For pollutants other than radionuclides, any site that emits or has the potential to emit, in the aggregate the following quantities:

(i) ten tons per year (tpy) or more of any single hazardous air pollutant listed under Federal Clean Air Act (FCAA), §112(b) (Hazardous Air Pollutants);

(ii) 25 tpy or more of any combination of hazardous air pollutant listed under FCAA, §112(b); or

(iii) any quantity less than those identified in clause (i) or (ii) of this subparagraph established by the United States Environmental Protection Agency (EPA) through rulemaking.

(B) For radionuclides regulated under FCAA, §112, the term "major source" has the meaning specified by the EPA by rule.

(C) Any site which directly emits or has the potential to emit, 100 tpy or more of any air pollutant. The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source, unless the stationary source belongs to one of the following categories of stationary sources:

(i) coal cleaning plants (with thermal dryers);

(ii) kraft pulp mills;

(iii) portland cement plants;

(iv) primary zinc smelters;

(v) iron and steel mills;

(vi) primary aluminum ore reduction plants;

(vii) primary copper smelters;

(viii) municipal incinerators capable of charging more than 250 tons of refuse per day;

(ix) hydrofluoric, sulfuric, or nitric acid plants;

(x) petroleum refineries;

(xi) lime plants;

(xii) phosphate rock processing plants;

(xiii) coke oven batteries;

(xiv) sulfur recovery plants;

(xv) carbon black plants (furnace process);

(xvi) primary lead smelters;

(xvii) fuel conversion plant;

(xviii) sintering plants;

(xix) secondary metal production plants;

(xx) chemical process plants;

(xxi) fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units (Btu) per hour heat input;

(xxii) petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) taconite ore processing plants;

(xxiv) glass fiber processing plants;

(xxv) charcoal production plants;

(xxvi) fossil fuel-fired steam electric plants of more than 250 million Btu per hour heat input; or

(xxvii) any stationary source category regulated under FCAA, §111 (Standards of Performance for New Stationary

Sources) or §112 for which the EPA has made an affirmative determination under FCAA, §302(j) (Definitions).

(D) Any site, except those exempted under FCAA, §182(f) (NOx Requirements), which, in whole or in part, is a major source under FCAA, Title I, Part D (Plan Requirements for Nonattainment Areas), including the following:

(i) any site with the potential to emit 100 tpy or more of volatile organic compounds (VOC) or nitrogen oxides (NOx) in any ozone nonattainment area classified as "marginal or moderate";

(ii) any site with the potential to emit 50 tpy or more of VOC or NOx in any ozone nonattainment area classified as "serious";

(iii) any site with the potential to emit 25 tpy or more of VOC or NOx in any ozone nonattainment area classified as "severe";

(iv) any site with the potential to emit ten tpy or more of VOC or NOx in any ozone nonattainment area classified as "extreme";

(v) any site with the potential to emit 100 tpy or more of carbon monoxide (CO) in any CO nonattainment area classified as "moderate";

(vi) any site with the potential to emit 50 tpy or more of CO in any CO nonattainment area classified as "serious";

(vii) any site with the potential to emit 100 tpy or more of inhalable particulate matter (PM-10) in any PM-10 nonattainment area classified as "moderate";

(viii) any site with the potential to emit 70 tpy or more of PM-10 in any PM-10 nonattainment area classified as "serious"; and

(ix) any site with the potential to emit 100 tpy or more of lead in any lead nonattainment area.

(E) The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source under subparagraph (D) of this paragraph, unless the stationary source belongs to one of the categories of stationary sources listed in subparagraph (C) of this paragraph.

(F) Any temporary source which is located at a site for less than six months shall not affect the determination of a major source for other stationary sources at a site under this chapter or require a revision to the existing permit at the site.

(G) Emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not the units are in a contiguous area or under common control, to determine whether the units or stations are major sources under subparagraph (A) of this paragraph.

(14) Notice and comment hearing--Any hearing held under this chapter. Hearings held under this chapter are for the purpose of receiving oral and written comments regarding draft permits.

(15) Permit or federal operating permit--

(A) any permit, or group of permits covering a site, that is issued, renewed, or revised under this chapter; or

(B) any general operating permit issued, renewed, or revised by the executive director under this chapter.

(16) Permit anniversary--The date that occurs every 12 months after the initial permit issuance, the initial granting of the authorization to operate, or renewal.

(17) Permit application--An application for an initial permit, permit revision, permit renewal, permit reopening, general operating permit, or any other similar application as may be required.

(18) Permit holder--A person who has been issued a permit or granted the authority by the executive director to operate under a general operating permit.

(19) Permit revision--Any administrative permit revision, minor permit revision, or significant permit revision that meets the related requirements of this chapter.

(20) Potential to emit--The maximum capacity of a stationary source to emit any air pollutant under its physical and operational design or configuration. Any certified registration established under §106.6 of this title (relating to Registration of Emissions), §116.611 of this title (relating to Registration to Use a Standard Permit), or §122.122 of this title (relating to Potential to Emit), or a permit by rule under Chapter 106 of this title (relating to Permits by Rule) or other new source review permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) restricting emissions or any physical or operational limitation on the capacity of a stationary source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the United States Environmental Protection Agency. This term does not alter or affect the use of this term for any other purposes under the Federal Clean Air Act (FCAA), or the term "capacity factor" as used in Acid Rain provisions of the FCAA or the Acid Rain rules.

(21) Preconstruction authorization--Any authorization to construct or modify an existing facility or facilities under Chapter 106 and Chapter 116 of this title (relating to Permits by Rule; and Control of Air Pollution by Permits for New Construction or Modification). In this chapter, references to preconstruction authorization will also include the following:

(A) any requirement established under Federal Clean Air Act (FCAA), §112(g) (Modifications); and

(B) any requirement established under FCAA, §112(j) (Equivalent Emission Limitation by Permit).

(22) Predictive emission monitoring system--A system that uses process and other parameters as inputs to a computer program or other data reduction system to produce values in terms of the applicable emission limitation or standard.

(23) Proposed permit--The version of a permit that the executive director forwards to the United States Environmental Protection Agency for a 45-day review period. The proposed permit may be the same document as the draft permit.

(24) Provisional terms and conditions--Temporary terms and conditions, established by the permit holder for an emission unit affected by a change at a site, or the promulgation or adoption of an applicable requirement or state-only requirement, under which the permit holder is authorized to operate prior to a revision or renewal of a permit or prior to the granting of a new authorization to operate.

(A) Provisional terms and conditions will only apply to changes not requiring prior approval by the executive director.

(B) Provisional terms and conditions shall not authorize the violation of any applicable requirement or state-only requirement.

(C) Provisional terms and conditions shall be consistent with and accurately incorporate the applicable requirements and state-only requirements.

(D) Provisional terms and conditions for applicable requirements and state-only requirements shall include the following:

(i) the specific regulatory citations in each applicable requirement or state-only requirement identifying the emission limitations and standards;

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under clause (i) of this subparagraph; and

(iii) where applicable, the specific regulatory citations identifying any requirements that no longer apply.

(25) Renewal--The process by which a permit or an authorization to operate under a general operating permit is renewed at the end of its term under §§122.241, 122.501, or 122.505 of this title (relating to Permit Renewals; General Operating Permits; or Renewal of the Authorization to Operate Under a General Operating Permit).

(26) Reopening--The process by which a permit is reopened for cause and terminated or revised under §122.231 of this title (relating to Permit Reopenings).

(27) Site--The total of all stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person (or persons under common control). A research and development operation and a collocated manufacturing facility shall be considered a single site if they each have the same two-digit Major Group Standard Industrial Classification (SIC) code (as described in the Standard Industrial Classification Manual, 1987) or the research and development operation is a support facility for the manufacturing facility.

(28) State-only requirement--Any requirement governing the emission of air pollutants from stationary sources that may be codified in the permit at the discretion of the executive director. State-only requirements shall not include any requirement required under the Federal Clean Air Act or under any applicable requirement.

(29) Stationary source--Any building, structure, facility, or installation that emits or may emit any air pollutant. Nonroad engines, as defined in 40 Code of Federal Regulations Part 89 (Control of Emissions from New and In-use Nonroad Engines), shall not be considered stationary sources for the purposes of this chapter.

§122.12. Acid Rain and[, and Clean Air Mercury Rule] Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Acid Rain permit--The legally binding and segregable portion of the federal operating permit issued under this chapter, including any permit revisions, specifying the Acid Rain Program requirements applicable to an affected source, to each affected unit at an affected source, and to the owners and operators and the designated representative of the affected source or the affected unit.

(2) Acid Rain Program--The national sulfur dioxide and nitrogen oxides air pollution control and emissions reduction program established in accordance with Federal Clean Air Act, Title IV, contained in 40 Code of Federal Regulations Parts 72 - 78.

(3) Clean Air Interstate Rule permit--The legally binding and federally enforceable written document, or portion of such document, issued by the permitting authority under 40 Code of Federal Regulations Part 96, Subpart CC or Subpart CCC, including any permit revisions, specifying the Clean Air Interstate Rule (CAIR) Nitrogen Oxides (NO_x) Annual Trading Program and CAIR Sulfur Dioxide (SO_2) Trading Program requirements applicable to a CAIR NO_x source and CAIR SO_2 source, to each CAIR NOx unit and CAIR SO_2 unit at the source, and to the owners and operators and the CAIR designated representative of the source and each such unit.

(4) Designated representative--The responsible individual authorized by the owners and operators of an affected source and of all affected units at the site, as evidenced by a certificate of representation submitted in accordance with the Acid Rain Program, to represent and legally bind each owner and operator, as a matter of federal law, in matters pertaining to the Acid Rain Program. Such matters include, but are not limited to: the holdings, transfers, or dispositions of allowances allocated to a unit; and the submission of or compliance with Acid Rain permits, permit applications, compliance plans, emission monitoring plans, continuous emissions monitor (CEM), and continuous opacity monitor (COM) certification notifications, CEM and COM certification and applications, quarterly monitoring and emission reports, and annual compliance certifications. Whenever the term "responsible official" is used in this chapter, it shall refer to the "designated representative" with regard to all matters under the Acid Rain Program.

[(5) Mercury budget permit--The legally binding and federally enforceable written document, or portion of such document, issued by the permitting authority under 40 Code of Federal Regulations §§60.4120 - 60.4124, including any permit revisions, specifying the Mercury Budget Trading Program requirements applicable to a mercury budget source, to each mercury budget unit at the source, and to the owners and operators and the mercury designated representative of the source and each such unit.]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2548

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SUBCHAPTER B. PERMIT REQUIREMENTS
DIVISION 1. GENERAL REQUIREMENTS

30 TAC §122.120

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which

authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.014, concerning Emission Inventory; §382.016, concerning Monitoring Requirements; House Bill 2481, §2, codified in THSC, §382.0173, concerning Adoption of Rules Regarding Certain SIP Requirements and Standards of Performance for Certain Sources; §382.054, concerning Federal Operating Permit; and Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq.,* which requires states to submit plans establishing standards of performance for existing sources of pollutants for which National Ambient Air Quality Standards have not been established and providing for the implementation and enforcement of such standards of performance.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.0173, and 382.054, and FCAA, 42 USC, §§7401 *et seq.*

§122.120. Applicability.

(a) Except as identified in subsection (b) of this section, owners and operators of one or more of the following are subject to the requirements of this chapter:

(1) any site that is a major source as defined in §122.10 of this title (relating to General Definitions);

(2) any site with an affected unit as defined in 40 Code of Federal Regulations Part 72 subject to the requirements of the Acid Rain Program;

(3) any solid waste incineration unit required to obtain a permit under Federal Clean Air Act (FCAA), §129(e) (relating to Solid Waste Combustion);

(4) any site that is a non-major source which the United States Environmental Protection Agency (EPA), through rulemaking, has designated as no longer exempt or no longer eligible for a deferral from the obligation to obtain a permit. For the purposes of this chapter, those sources may be any of the following:

(A) any non-major source so designated by the EPA, and subject to a standard, limitation, or other requirement under FCAA, §111 (relating to Standards of Performance for New Stationary Sources);

(B) any non-major source so designated by the EPA, and subject to a standard or other requirement under FCAA, §112 (relating to Hazardous Air Pollutants), except for FCAA, §112(r) (relating to Prevention of Accidental Releases); or

(C) any non-major source in a source category designated by the EPA;

(5) any Clean Air Interstate Rule (CAIR) nitrogen oxides unit, as defined in 40 CFR §96.102, Definitions, if the CAIR nitrogen oxides unit is otherwise required to have a federal operating permit; or

(6) any CAIR sulfur dioxide unit, as defined in 40 CFR §96.202, Definitions, if the CAIR sulfur dioxide unit is otherwise required to have a federal operating permit.[; ~~or~~]

~~[(7) any mercury budget unit, as defined in 40 CFR §60.4102, if the mercury budget unit is otherwise required to have a federal operating permit.]~~

(b) The following are not subject to the requirements of this chapter:

(1) any site that is a non-major source which the EPA, through rulemaking, has designated as exempt from the obligation to obtain a permit; or

(2) any site that is a non-major source which the EPA has allowed permitting authorities to defer from the obligation to obtain a permit.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2548

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SUBCHAPTER E. ACID RAIN PERMITS AND CLEAN AIR INTERSTATE RULE
DIVISION 3. CLEAN AIR MERCURY RULE

30 TAC §§122.440, 122.442, 122.444, 122.446, 122.448

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeals are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.014, concerning Emission Inventory; §382.016, concerning Monitoring Requirements; House Bill 2481, §2, codified in THSC, §382.0173, concerning Adoption of Rules Regarding Certain SIP Requirements and Standards of Performance for Certain Sources; §382.054, concerning Federal Operating Permit; and Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq.,* which requires states to submit plans establishing standards of performance for existing sources of pollutants for which National Ambient Air Quality Standards have not been established and providing for the implementation and enforcement of such standards of performance.

The proposed repeals implement THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.0173, and 382.054, and FCAA, 42 USC, §§7401 *et seq.*

§122.440. General Mercury Budget Trading Program Permit Requirements.

§122.442. Submission of Mercury Budget Permit Applications.

§122.444. Information Requirements for Mercury Budget Permit Applications.

§122.446. Mercury Budget Permit Contents and Term.

§122.448. Mercury Budget Permit Revisions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUCATION

CHAPTER 211. ADMINISTRATION

37 TAC §211.3

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §211.3, Public Information. Subsection (c)(4) identifies the Commission's jurisdictional complaint process. Subsection (d) is amended to reflect the effective date of the changes.

These amendments are necessary to incorporate the changes to Texas Occupations Code §1701.202 from House Bill 3389, Section 9.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by ensuring that the Commission's jurisdictional complaint process is identified by rule and available for public inspection.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, as a result of the proposed section. The Commission has determined that for each year of the first five years the section as proposed will be in effect, there may be a cost to individuals who file a jurisdictional complaint and desire copies of the jurisdictional complaint process, as a result of the proposed section.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.202, Complaints.

No other code, article, or statute is affected by this proposal.

§211.3. Public Information.

(a) All commission rules are published in the Texas Register as they are proposed and adopted.

(b) The commission will index, maintain, and make available for public inspection at the Austin headquarters a copy of:

(1) the current rules;

(2) all interpretive memoranda, policies, and procedures; and

(3) all final orders, decisions, and opinions of the commission.

(c) Members of the public may obtain:

(1) copies of the rules and other documents published by the commission at the cost recovery rate established in the fee schedule for printed documents, which is [. ~~The current cost schedules are~~] available upon request from the commission;

(2) the rules and many other documents published by the commission are also available free of charge on the commission website: www.tcleose.state.tx.us; [~~and~~]

(3) unpublished materials available under the Public Information Act at the rate established by the Texas Facilities Commission [~~General Services Commission~~] for such materials; and [.]

(4) the jurisdictional complaint process, including:

(A) complaint intake;

(B) investigation;

(C) adjudication and relevant hearings;

(D) appeals;

(E) the imposition of sanctions; and

(F) public disclosure.

(d) The effective date of this section is January 14, 2010. [~~June 1, 2004.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904008

Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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For further information, please call: (512) 936-7713

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37 TAC §211.16

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes new §211.16, Establishment of an Appointing Entity. Subsection (a) identifies the effective date for law enforcement agency applications. Subsection (b) identifies the specific information required for a law enforcement agency reporting number. Subsection (c) identifies the requirements for correctional facilities. Subsection (d) identifies the requirements for consolidated emergency telecommunications centers. Subsection (e) identifies the requirements for probation or parole departments. Subsection (f) identifies the effective date.

This proposal is necessary to incorporate the changes to Texas Occupations Code §1701.163 from House Bill 3389, §7.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive effect on state or local governments. Addition of this section will require that vital matters be considered before taking on the burden of adding an additional department of government. Those officials will have to consider several economic factors associated with establishing a law enforcement agency. This section will also facilitate agencies that employ licensees to apply for a reporting number to assist both the agency and the commission with tracking those licensees.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be positive benefits to the public by making governmental entities aware of the various responsibilities that follow the creation of a law enforcement agency.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there may be positive effect on small business, individuals, or both as a result of the proposed section as a new agency may have need of various goods and services in order to function.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290 Ste. 200, Austin, TX 78723-1035.

The new section is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The new section as proposed complies with Texas Occupations Code, Chapter 1701, §1701.163, Information Provided by Commissioning Entities.

No other code, article, or statute is affected by this proposal.

§211.16. Establishment of an Appointing Entity.

(a) On or after September 1, 2009, an entity authorized by statute or by the constitution to create a law enforcement agency or police department and commission, appoint, or employ peace officers that first creates a law enforcement agency or police department and first begins to commission, appoint, or employ peace officers shall make application to the commission.

(b) On creation of the law enforcement agency or police department, and as part of the application process, the entity shall submit to the commission the current agency number, application form, any associated application fee, and information regarding:

(1) the need for the law enforcement agency or police department in the community;

(2) the funding sources for the law enforcement agency or police department;

(3) the physical resources available to officers;

(4) the physical facilities that the law enforcement agency or police department will operate, including descriptions of the evidence room, dispatch area, and public area;

(5) law enforcement policies of the law enforcement agency or police department, including policies on:

(A) use of force;

(B) vehicle pursuit;

(C) professional conduct of officers;

(D) domestic abuse protocols;

(E) response to missing persons;

(F) supervision of part-time officers; and

(G) impartial policing;

(6) the administrative structure of the law enforcement agency or police department;

(7) liability insurance; and

(8) any other information the commission requires by rule.

(c) An entity authorized by Local Government Code, §511.0092 to operate a correctional facility to house inmates, in this state, convicted of offenses committed against the laws of another state of the United States, and appoint jailers requiring licensure by the commission, may make application for an agency number by submitting the current agency number application form, any associated application fee, and a certified copy of the contract under which the facility will operate.

(d) A political subdivision wanting to establish a consolidated emergency telecommunications center and appoint telecommunicators, as required by Texas Occupations Code, §1701.405, may make application for an agency number by submitting the current agency number application form, any associated application fee and a certified copy of the consolidation contract.

(e) The Texas Department of Criminal Justice - Pardon and Parole Division, a community supervision and corrections department, or a juvenile probation department may make application for an agency number if seeking firearms training certificates for parole officers, community supervision and corrections officers, or juvenile probation officers by submitting the current agency number application form and any associated application fee.

(f) The effective date of this section is January 14, 2010.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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For further information, please call: (512) 936-7713

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37 TAC §211.19

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §211.19, Forms and Applications. Subsection (a) is added to incorporate electronic submission of documents. The remaining subsections have been re-lettered. Subsection (h) is amended to reflect the effective date.

These amendments are necessary to incorporate the changes to Texas Occupations Code §1701.153 from House Bill 3389, §5.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by utilizing an electronic reporting system that will improve the efficiency in updating information reported to the agency and providing current and accurate information to the public.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290 Ste. 200 Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.153, Electronic Submission of Forms, Data, and Documents.

No other code, article, or statute is affected by this proposal.

§211.19. Forms and Applications.

(a) Applications, forms, data, and documents required by the commission shall be submitted electronically if an electronic method has been established for the form, data, or document.

(b) [~~(a)~~] For [~~On~~] applications or other forms required by the commission, the applicant or the individual on whose behalf the form is being submitted is responsible for reviewing the entire document and any attachments to attest to the accuracy and truthfulness of all information on and attached to the document.

(c) [~~(b)~~] A person who fails to comply with the standards set forth in these rules shall not accept the issuance of a license and shall not accept any appointment.

(d) [~~(c)~~] If an application is found to be false or untrue, any license or certificate issued to the applicant by the commission will be subject to cancellation and recall.

(e) [~~(d)~~] Agencies must keep on file and in a format readily accessible to the commission a copy of the documentation required by the commission. If the form or application is submitted via TCLEDDS, the agency must keep on file, and in a format readily accessible to the commission, a signed and dated printout of the electronically submitted form or application.

(f) [~~(e)~~] An agency must retain required records for a minimum of five years after the licensee's termination date with that agency.

(g) [~~(f)~~] An agency must report to the commission any failure to appoint an individual in the reported capacity within 30 days of the reported date of appointment. Such report must be made in the currently prescribed commission format for termination.

(h) [~~(g)~~] The effective date of this section is January 14, 2010. [~~March 1, 2008.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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37 TAC §211.26

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes new §211.26, Law Enforcement Agency Audits. Subsection (a) requires the Commission to audit all law enforcement agencies at least once every five years. Subsection (b) identifies the documents to be reviewed during an audit. Subsection (c) identifies parties that will be notified of the audit results. Subsection (d) addresses the correction of deficiencies. Subsection (f) identifies the effective date.

This proposal is necessary to incorporate the changes to Texas Occupations Code §1701.162 from House Bill 3389, §7.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by ensuring that all law enforcement agencies are audited.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be

no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290 Ste. 200, Austin, TX 78723-1035.

The new section is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The new section as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.162, Records and Audit Requirements.

No other code, article, or statute is affected by this proposal.

§211.26. Law Enforcement Agency Audits.

(a) All law enforcement agencies shall be audited at least once every five years. Agencies with deficiencies will be evaluated more frequently, as determined by the commission.

(b) The commission may use the following information in auditing an agency:

(1) commission records;

(2) history of previous violations;

(3) reports from past audits;

(4) on-site audits;

(5) reports and complaints from licensees, other law enforcement agencies, and citizens; and

(6) observations by commission staff.

(c) The results of the audit will be forwarded to the chief administrator and governing body.

(d) If deficiencies are identified, the chief administrator must report to the commission in writing within 30 days what steps are being taken to correct deficiencies and on what date they expect to be in compliance.

(e) The commission may impose administrative penalties and/or take disciplinary action.

(f) The effective date of this section is January 14, 2010.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: October 25, 2009

For further information, please call: (512) 936-7713

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37 TAC §211.27

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission on Law Enforcement Officer Standards and Education or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes the repeal of and new §211.27, Reporting Responsibilities of Individuals. The section proposed for repeal addresses the reporting requirements of individuals. The proposed repeal of and new rule, which appears elsewhere in this issue of the *Texas Register,* would identify the reporting requirements for individuals already licensed and those awaiting licensure. These requirements include: name and address changes; arrests, charges or indictments; final disposition of criminal actions; military separations; and an effective date.

Proposed new §211.27, Reporting Responsibilities of Individuals, would clarify the individuals' reporting requirements. These changes are necessary to incorporate the changes to Texas Occupations Code, §1701.307, from House Bill 2799.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by ensuring that individuals eligible to be licensed are held to the same standard as licensees.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The repeal of §211.27 is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The repeal as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.3075, Qualified Applicant Awaiting Appointment.

No other code, article, or statute is affected by this proposal.

§211.27. Reporting Responsibilities of Individuals.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904012

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: October 25, 2009

For further information, please call: (512) 936-7713

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37 TAC §211.27

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes the repeal of and new §211.27, Reporting Responsibilities of Individuals. The section proposed for repeal, which appears elsewhere in this issue of the *Texas Register,* addresses the reporting requirements of individuals. The proposed new rule would identify the reporting requirements for individuals already licensed and those awaiting licensure. These requirements include: name and address changes; arrests, charges or indictments; final disposition of criminal actions; military separations; and an effective date.

Proposed new §211.27, Reporting Responsibilities of Individuals, would clarify the individuals' reporting requirements. These changes are necessary to incorporate the changes to Texas Occupations Code, §1701.307, from House Bill 2799.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by ensuring that individuals eligible to be licensed are held to the same standard as licensees.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The new section is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The new section as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.3075, Qualified Applicant Awaiting Appointment.

No other code, article, or statute is affected by this proposal.

§211.27. Reporting Responsibilities of Individuals.

(a) An individual who either is a licensee or meets the requirements of Texas Occupations Code §1701.307(a) must report to the commission, in a format prescribed by the commission, within 30 days:

(1) any name change;

(2) a permanent mailing address other than an agency address;

(3) all subsequent address changes;

(4) an arrest, charge, or indictment for a criminal offense above the grade of Class C misdemeanor, or for any Class C misdemeanor involving the duties and responsibilities of office or family violence, including the name of the arresting agency, the style, court, and cause number of the charge or indictment, if any;

(5) the final disposition of the criminal action; and

(6) all subsequent DD214s to the commission indicating any military discharge other than under honorable or general-under-honorable conditions.

(b) The effective date of this section is January 14, 2010.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904013

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: October 25, 2009

For further information, please call: (512) 936-7713

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37 TAC §211.29

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §211.29, Responsibilities of Agency Chief Administrators. Subsection (b) adds the reporting requirements of incident-based data collected for racial profiling. The subsections that follow thereafter are re-lettered due to the addition. Subsection (m) reflects the effective date of the changes.

These amendments are necessary to incorporate the changes to Texas Occupations Code, §1701.164, from House Bill 3389, Section 8.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by ensuring that all agencies are in compliance with the incident-based reporting requirements.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.164, Collection of Certain Incident-Based Data Submitted by Law Enforcement Agencies.

No other code, article, or statute is affected by this proposal.

§211.29. Responsibilities of Agency Chief Administrators.

(a) An agency chief administrator is responsible for making any and all reports and submitting any and all documents required of that agency by the commission.

(b) An agency chief administrator must report, in a standard format, incident-based data compiled in accordance with Texas Occupations Code §1701.164.

(c) [~~(b)~~] An agency appointing a person who does not hold a commission license must file an application for the appropriate license with the commission.

(d) [~~(c)~~] Before an agency appoints any licensee to a position requiring a commission license it shall complete the reporting requirements of Texas Occupations Code §1701.451.

(e) [~~(d)~~] An agency shall notify the commission, electronically or in writing, within 30 days, when it receives information that a person under appointment with that agency has been arrested, charged, indicted, or convicted for any offense above a Class C misdemeanor, or for any Class C misdemeanor involving the duties and responsibilities of office or family violence.

(f) [~~(e)~~] Except in the case of a commission error, an agency that wishes to report a change to any information within commission files about a licensee shall do so in a request to the commission, containing:

(1) the licensees name, date of birth, last four digits of the social security number, or PID;

(2) the requested change; and

(3) the reason for the change.

(g) [~~(f)~~] An agency must notify the commission, electronically or in writing, following the requirements of Texas Occupations Code §1701.452 within 7 business days, when a person under appointment with that agency resigns or is terminated.

(h) [~~(g)~~] An agency chief administrator must comply with orders from the commission regarding the correction of a report of resignation/termination or request a hearing from SOAH.

(i) [~~(h)~~] Line of duty deaths shall be reported to the commission in current peace officers' memorial reporting formats.

(j) [~~(i)~~] An individual who is appointed or elected to the position of the chief administrator of a law enforcement agency shall notify the Commission of the date of appointment and title, through a form prescribed by the Commission within 30 days of such appointment.

(k) [~~(j)~~] An individual who vacates an appointed or elected position of the chief administrator of a law enforcement agency shall notify the Commission of the date the position was terminated, through a form prescribed by the Commission within 7 business days of vacating that position.

(l) [~~(k)~~] An agency chief administrator must report to the commission within 30 days, any change in the agency's name, physical location, mailing address, electronic mail address, or telephone number.

(m) [~~(l)~~] The effective date of this section is January 14, 2010. [~~January 1, 2009.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904014
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 936-7713

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CHAPTER 215. TRAINING AND EDUCATIONAL PROVIDERS AND RELATED MATTERS

37 TAC §215.13

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes amendments to §215.13, Risk Assessment. Subsection (a) is amended to reflect the terminology change. Subsection (a)(1) - (12) is amended for renumbering. Subsection (b) is amended to reflect the terminology change. Subsection (c) is amended to reflect the terminology change. Subsection (c)(1) - (11) is amended for renumbering. Subsection (d) is amended for grammatical change. Subsection (e) is added to include a timeline and procedure for tracking a training provider's progress toward compliance. Subsection (g) is amended to reflect the terminology change. Subsection (h) is amended to reflect the effective date.

These amendments are necessary to incorporate the changes to Texas Occupations Code §1701.254 from House Bill 3389, §13.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by identifying and assisting at risk programs in returning to compliance so they may provide effective law enforcement officer training program for the community.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290 Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.254, Risk Assessment and Inspections.

No other code, article, or statute is affected by this proposal.

§215.13. Risk Assessment.

(a) A law enforcement academy may be found at risk and placed on at-risk probationary status if:

[(1) after January 1, 2003, if the passing rate on a licensing examination for first attempts for any state fiscal year is less than 70 percent of the students attempting the licensing exam;]

(1) [(2)] after September 1, 2009, the passing rate on a licensing exam for first attempts for any three consecutive state fiscal years, beginning with state fiscal year 2007 (September 1, 2006 through August 31, 2007) is less than 80 percent of the students attempting the licensing exam;

(2) [(3)] commission required learning objectives are not taught;

(3) [(4)] lesson plans for classes conducted are not on file;

(4) [(5)] examination and other evaluative scoring documentation is not on file;

(5) [(6)] the academy submits false reports to the commission;

(6) [(7)] the academy makes repeated errors in reporting;

(7) [(8)] the academy does not respond to commission requests for information;

(8) [(9)] the academy does not comply with commission rules or other applicable law;

(9) [(10)] the academy does not achieve the goals identified in its application for a license;

(10) [(11)] the academy does not meet the needs of the officers and law enforcement agencies served; or

(11) [(12)] the commission has received sustained complaints or evaluations from students or the law enforcement community concerning the quality of training or failure to meet training needs for the service area.

(b) A contractual provider may be found at risk and placed on at-risk probationary status if:

(1) the contractor provides licensing courses and fails to comply with the passing rates in subsection (a)(1) of this section;

(2) lesson plans for classes conducted are not on file;

(3) examination and other evaluative scoring documentation is not on file;

(4) the provider submits false reports to the commission;

(5) the provider makes repeated errors in reporting;

(6) the provider does not respond to commission requests for information;

(7) the provider does not comply with commission rules or other applicable law;

(8) the provider does not achieve the goals identified in its application for a license or contract;

(9) the provider does not meet the needs of the officers and law enforcement agencies served; or

(10) the commission has received sustained complaints or evaluations from students or the law enforcement community concerning the quality of training or failure to meet training needs for the service area.

(c) An academic alternative provider may be found at risk and placed on at-risk probationary status if:

(1) the academic alternative provider fails to comply with the passing rates in subsection (a)(1) of this section;

[(1) after January 1, 2003, if the passing rate on a licensing examination for first attempts for any 3 state fiscal year period is less than 70 percent of the students attempting the licensing exam;]

[(2) after September 1, 2009, the passing rate on a licensing exam for first attempts for any three consecutive state fiscal years, beginning with state fiscal year 2007 (September 1, 2006 through August 31, 2007) is less than 80 percent of the students attempting the licensing exam;]

(2) [(3)] courses are not conducted in compliance with Higher Education Program Guidelines accepted by the commission;

(3) [(4)] the commission required learning objectives are not taught;

(4) [(5)] the program submits false reports to the commission;

(5) [(6)] the program makes repeated errors in reporting;

(6) [(7)] the program does not respond to commission requests for information;

(7) [(8)] the program does not comply with commission rules or other applicable law;

(8) [(9)] the program does not achieve the goals identified in its application for a license or contract;

(9) [(10)] the program does not meet the needs of the students and law enforcement agencies served; or

(10) [(11)] the commission has received sustained complaints or evaluations from students or the law enforcement community concerning the quality of education or failure to meet education needs for the service area.

(d) If at risk, the chief administrator of the sponsoring organization, or the training coordinator, must report to the commission in writing within 30 days what steps are being [have been] taken to correct deficiencies and on what date they expect to be in compliance.

(e) The chief administrator of the sponsoring organization, or the training coordinator, shall report to the commission the progress toward compliance within the timelines provided in the management response as provided in subsection (d) of this section.

(f) [(e)] The commission may take action to revoke their license or contract. The commission may choose not to renew a license or contract with a program that has been found to be at risk or the commission may renew the contract for a shorter period than stated in §215.1 of this chapter.

(g) [(f)] A training or educational program placed on at-risk probationary status [at risk] must notify all students and potential students of their at-risk [at risk] status.

(h) [(g)] The effective date of this section is January 14, 2010. [July 6, 2009.]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904015

Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 936-7713

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CHAPTER 217. LICENSING REQUIREMENTS

37 TAC §217.7

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §217.7, Reporting the Appointment and Termination of a Licensee. Subsection (a), (a)(1) and (a)(2) are amended to allow for the electronic submission of requests. The subsections that follow were re-lettered as a result. Subsection (f)(4) is amended for a grammatical change. Subsection (j) is amended to reflect the effective date.

These amendments are necessary to incorporate the changes to Texas Occupations Code §1701.451 from House Bill 3389, §19.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by allowing agencies to utilize electronic submission of requests.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290 Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.451, Pre-employment Request for Employment Termination Report and Submission of Background Check Confirmation Form.

No other code, article, or statute is affected by this proposal.

§217.7. Reporting the Appointment and Termination of a Licensee.

(a) Before a law enforcement agency may hire a person licensed under Chapter 1701, Texas Occupations Code, the agency head or the agency head's designee must[~~, on the agency's letterhead with the appropriate signature~~]:

(1) make a [~~written~~] request to the commission for any employment termination report(s) [~~report~~] regarding the person [~~that is~~] maintained by the commission under this chapter; and

(2) submit to the commission in a manner [~~on the form~~] prescribed by the commission confirmation that the agency:

(A) conducted in the manner prescribed by the commission a criminal background check regarding the person;

(B) obtained the person's written consent on a form prescribed by the commission for the agency to view the person's employment records;

(C) obtained from the commission any service or education records regarding the person maintained by the commission; and

(D) contacted each of the person's previous law enforcement employers.

(b) A request submitted electronically under this section must contain identifying information, acceptable to the commission, for verification.

(c) [~~(b)~~] A law enforcement agency that obtains a consent form described by subsection (a)(2)(B) of this section shall make the person's employment records available to a hiring law enforcement agency on request.

(d) [~~(c)~~] Before appointing a licensee whose license is inactive or has expired, an agency shall ensure that the individual meets the current minimum standards for licensure.

(e) [~~(d)~~] An agency that appoints an individual who already holds a valid, active license appropriate to that position must notify the commission of such appointment not later than 30 days after the date of appointment. The appointing agency must have on file documentation that a peace officer licensee is compliant with weapons qualification according to §217.21 of this chapter within the last 12 months.

(f) [~~(e)~~] If the appointment is made after a 180-day break in service, the agency must have the following on file and readily accessible to the commission:

(1) a new criminal history check by name, sex, race and date of birth from both TCIC and NCIC;

(2) a new declaration of psychological and emotional health;

(3) a new declaration of lack of any drug dependency or illegal drug use; and

(4) one completed applicant fingerprint card or, pending receipt of such card, an original sworn, notarized affidavit by the applicant of their [~~his or her~~] complete criminal history; such affidavit to be maintained by the agency while awaiting the return of completed applicant fingerprint card; and

(5) for peace officers, weapons qualification according to §217.21 of this chapter within the last 12 months.

(g) [~~(f)~~] When an individual licensed by the commission or a telecommunicator separates from appointment or employment with an agency, the agency shall submit a report to the commission in the currently prescribed commission format that reports the separation. The report shall be submitted within 7 business days following the date of separation. If a licensee has filed a timely grievance or appeal within the personnel policies of the agency, the agency shall not be required to file the report until all administrative remedies have been exhausted. The agency shall provide the individual who is the subject of the report a copy of the report within 7 business days after the date of separation.

(h) [~~(g)~~] An agency must retain records kept under this section for a minimum of 5 years after the licensee's termination date with that agency. The records must be maintained in a format readily accessible to the commission.

(i) [~~(h)~~] A report or statement of separation submitted under subsection (g) [~~(f)~~] of this section is exempt from disclosure under the Public Information Act, Chapter 552, Texas Government Code, unless the individual resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses, and is subject to subpoena only in a judicial proceeding.

(j) [~~(i)~~] The effective date of this section is January 14, 2010. [~~May 1, 2009.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904016
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 936-7713

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37 TAC §217.8

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §217.8, Contesting an Employment Termination Report. Subsection (a) is amended to clarify a reference to another rule. Subsection (d) is amended to reflect a procedural change. Subsection (e) is amended to identify the commission is not a party to these contested cases. Subsection (i) is amended to reflect the effective date.

These amendments are necessary to incorporate the changes to Texas Occupations Code, §1701.4525, from House Bill 3389, Section 20.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by clarifying that the Commission is not a party to SOAH hearings related to employment termination.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.4525, Request for Correction of Report; Administrative Penalty; Hearing; Appeal.

No other code, article, or statute is affected by this proposal.

§217.8. Contesting an Employment Termination Report.

(a) A person who is the subject of an employment termination report described in §217.7(f)[~~(g)~~] of this chapter is entitled to file a petition contesting information included in the employment termination report. The petition for correction of the report must be filed with the executive director and a copy must be served on the law enforcement agency.

(b) A petition described in subsection (a) of this section must be received by the executive director not later than the 30th day after the person receives a copy of the report, and must be accompanied by any evidence offered by the person in support of the requested correction.

(c) The law enforcement agency may submit rebutting evidence not later than the 20th day after the agency receives a copy of the petition.

(d) Upon review of the petition, the executive director will refer the dispute to SOAH.

[~~(d) Upon review of the petition and any rebutting evidence offered by the law enforcement agency, the executive director may either:~~]

[~~(1) recommend that the commission order the chief administrative officer of the law enforcement agency to correct the report; or~~]

[~~(2) refer the dispute to the State Office of Administrative Hearings.~~]

(e) A proceeding conducted pursuant to subsection (d)[~~(2)~~] of this section is a contested case under Chapter 2001, Government Code. The parties to the proceeding shall be the person contesting the employment termination and the chief administrative officer of the law enforcement agency. The commission is not considered a party in a proceeding conducted by SOAH. [~~the person contesting the employment termination report, the chief administrative officer of the law enforcement agency, and the executive director.~~] The chief administrative officer of the law enforcement agency shall have the burden of proof by a preponderance of the evidence. Following the contested case hearing, the administrative law judge shall issue a final order on the petition.

(f) Any party to a proceeding described in subsection (e) of this section may file exceptions to the administrative law judge's final order in accordance with SOAH [~~State Office of Administrative Hearings~~] rules and procedures.

(g) The results of a hearing described in subsection (e) of this section are enforceable by the commission pursuant to Chapter 1701, Texas Occupations Code, and Chapter 2001, Government Code.

(h) The results of a hearing described in subsection (e) of this section are appealable in accordance with Chapter 2001, Government Code.

(i) A chief administrative officer of a law enforcement agency who fails to comply with the results of a hearing described in subsection (e) of this section is subject to disciplinary action pursuant to Chapter 1701, Texas Occupations Code, and Chapter 223 of this title.

[~~(g) A final order issued by the commission under subsection (d)(1), of this section or after a hearing described in subsection (e) of this section is enforceable by the commission pursuant to Chapter 1701, Texas Occupations Code and Chapter 2001, Government Code.~~]

~~[(h) A final order issued by the commission under subsection (d)(1), of this section or after a hearing described in subsection (e) of this section is appealable in accordance with chapter 2001, Government Code.]~~

~~[(i) A chief administrative officer of a law enforcement agency who fails to comply with a final order issued by the commission under subsection (d)(1) of this section, or after a hearing described in subsection (e) of this section is subject to disciplinary action pursuant to Chapter 1701, Texas Occupations Code, and Chapter 223 of this title.]~~

(j) The effective date of this section is January 14, 2010. [~~March 1, 2008.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904017
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 936-7713

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37 TAC §217.11

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission on Law Enforcement Officer Standards and Education or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes the repeal of and new §217.11, Legislatively Required Continuing Education for Licensees. The section proposed for repeal addresses the continuing education requirements of licensees. The proposed repeal of and new rule, which appears elsewhere in this issue of the *Texas Register,* would identify the continuing education requirements for individuals licensed as peace officers, county jailers, and reserves. These requirements include: changes to the laws of this state and of the United States pertaining to peace officers; civil rights, racial sensitivity, and cultural diversity; de-escalation and crisis intervention techniques to facilitate interaction with persons with mental impairments; and unless determined by the agency head to be inconsistent with the officer's assigned duties: the recognition and documentation of cases that involve child abuse or neglect, family violence, and sexual assault; issues concerning sex offender characteristics; and effective date.

Proposed new §217.11, Legislatively Required Continuing Education for Licensees, would clarify the licensees' continuing education requirements. These changes are necessary to incorporate the changes to Texas Occupations Code, §1701.351, from House Bill 3389, Sections 15 and 16. Additional amendments are necessary to incorporate the changes to Texas Occupations Code, §1701.351, from House Bill 4009, Section 5.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by ensuring that all peace officers receive training on changes to the laws of this state and of the United States.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there may be a positive economic impact for small businesses. With a new training course, those businesses offering training may see an increase in business.

The Commission has determined that there may be a monetary cost and time investment to licensees.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The repeal is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The repeal as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.351, Continuing Education Required for Peace Officers.

No other code, article, or statute is affected by this proposal.

§217.11. Legislatively Required Continuing Education for Licensees.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904018
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 936-7713

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37 TAC §217.11

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes the repeal of and new §217.11, Legislatively Required Continuing Education for Licensees. The proposed repeal appears elsewhere in this issue of the *Texas Register.* The section proposed for repeal addresses the continuing education requirements of licensees. The proposed repeal and new rule would identify the continuing education requirements for individuals licensed as peace officers, county jailers, and reserves. These requirements include: changes to the laws of this state and of the United States pertaining to peace officers; civil rights, racial sensitivity, and cultural diversity; de-escalation and crisis intervention techniques to facilitate interaction with persons with mental impairments; and unless determined by the agency head to be

inconsistent with the officer's assigned duties: the recognition and documentation of cases that involve child abuse or neglect, family violence, and sexual assault; issues concerning sex offender characteristics, and effective date.

The proposed action would repeal the current requirements from rule and specify the continuing education requirements for licensees.

Current §217.11, proposed for repeal, describes the continuing education requirements for licensees.

Proposed new §217.11, Legislatively Required Continuing Education for Licensees, would clarify the licensees' continuing education requirements. These changes are necessary to incorporate the changes to Texas Occupations Code §1701.351 from House Bill 3389, §15 and §16. Additional amendments are necessary to incorporate the changes to Texas Occupations Code §1701.351 from House Bill 4009, §5.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by ensuring that all peace officers receive training on changes to the laws of this state and of the United States.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there may be a positive economic impact for small businesses. With a new training course, those businesses offering training may see an increase in business.

The Commission has determined that there may be a monetary cost and time investment to licensees.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290 Ste. 200, Austin, TX 78723-1035.

The new section is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The new section as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.351, Continuing Education Required for Peace Officers.

No other code, article, or statute is affected by this proposal.

§217.11. Legislatively Required Continuing Education for Licensees.

(a) Individuals appointed as peace officers shall complete at least 40 hours of continuing education training and must complete a training and education program that covers recent changes to the laws of this state and of the United States pertaining to peace officers every 24-month unit of a training cycle.

(b) Each agency that appoints or employs peace officers, reserve law enforcement officers, jailers, or public security officers shall provide each peace officer, reserve law enforcement officer, jailer, or public security officer whom it appoints or employs with a continuing education program at least once every 48-month training cycle. Part of this training program consists of topics selected by the agency. This rule does not limit the number of hours of continuing education an agency may provide.

(c) Part of the legislatively required peace officer training in every 48-month training cycle must include the curricula and learning objectives developed by the commission, to include:

(1) for an officer holding a basic proficiency certificate or less, not more than 20 hours of education and training that contain curricula incorporating the learning objectives developed by the commission regarding:

(A) civil rights, racial sensitivity, and cultural diversity;

(B) de-escalation and crisis intervention techniques to facilitate interaction with persons with mental impairments; and

(C) unless determined by the agency head to be inconsistent with the officer's assigned duties:

(i) the recognition and documentation of cases that involve child abuse or neglect, family violence, and sexual assault; and

(ii) issues concerning sex offender characteristics; and

(2) supervision issues for each peace officer appointed to their first supervisory position, this training must be completed within 24 months following the date of appointment as a supervisor.

(d) Individuals licensed as reserve law enforcement officers, jailers, or public security officers shall meet the training requirements for civil rights, racial sensitivity, and cultural diversity in every 48-month training cycle.

(e) A peace officer first licensed on or after January 1, 2011, must complete a basic training program on the trafficking of persons within one year of licensure.

(f) For appointed or elected constables:

(1) An individual appointed or elected to that individual's first position as constable must complete at least 40 hours of initial training for new constables in accordance with §1701.3545(c), Texas Occupations Code.

(2) Each constable must complete at least 40 hours of continuing education in accordance with §1701.3545(b), Texas Occupations Code, each 48-month period.

(g) Each deputy constable shall also complete a 20 hour course of training in civil process during each current training cycle.

(h) In accordance with §96.641, Texas Education Code, individuals appointed as "chief" or "police chief" of a police department:

(1) A newly appointed or elected police chief shall complete the initial training program for new chiefs not later than the second anniversary of that individual's appointment or election as chief.

(2) Each police chief must receive at least 40 hours of continuing education provided by the Bill Blackwood Law Enforcement Management Institute each 24-month period.

(i) The commission shall provide adequate notice to agencies and licensees of impending non-compliance with the legislatively required continuing education.

(j) The chief administrator of an agency that has licensees who are in non-compliance shall, within 30 days of receipt of notice of non-compliance, submit a report to the commission explaining the reasons for such non-compliance.

(k) The commission may take disciplinary action against a licensee for failure to complete the legislatively required continuing education program at least once every training unit.

(l) The commission may take disciplinary action against a licensee for failure to complete the appropriate training within a training cycle.

(m) Individuals licensed as peace officers shall complete the legislatively required continuing education program required under this section beginning in the first complete 24-month unit immediately following the date of licensing.

(n) Individuals licensed as county jailers shall complete the legislatively required continuing education program required under this section beginning in the first complete 48-month cycle immediately following the date of licensing.

(o) All peace officers must meet all continuing education requirements except where exempt by law.

(p) The effective date of this section is January 14, 2010.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904019
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 936-7713

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37 TAC §217.21

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §217.21, Firearms Proficiency Requirements. Subsection (a) is amended to require an agency that employs or appoints one officer to qualify at least once per year. Subsection (c)(3) is amended for clarification. Subsection (f) is amended to reflect the effective date of the changes.

These amendments are necessary to incorporate the changes to Texas Occupations Code §1701.355, Continuing Demonstration of Weapons Proficiency from Senate Bill 1303.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there may be an effect on state or local governments as a result of administering this section as agencies that were not previously required to qualify may now have to buy qualification ammunition.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by ensuring that all law enforcement agencies will have firearms qualification requirements.

The Commission has also determined that there may be a positive economic impact for small businesses. With more agencies qualifying, those businesses offering ammunition or firearms range time may see an increase in business.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290 Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.355, Continuing Demonstration of Weapons Proficiency.

No other code, article, or statute is affected by this proposal.

§217.21. Firearms Proficiency Requirements.

(a) Each agency or entity that employs at least one [~~two~~] peace officer [~~officers~~] shall:

(1) require each peace officer that it employs to successfully complete the current firearms proficiency requirements at least once each year;

(2) designate a firearms proficiency officer to be responsible for the documentation of annual firearms proficiency. The documentation for each officer shall include:

(A) date of qualification;

(B) identification of officer;

(C) firearm manufacturer, model;

(D) results of qualifying; and

(E) course(s) of fire.

(3) keep on file and in a format readily accessible to the commission a copy of all records of this proficiency.

(b) The annual firearms proficiency requirements shall include:

(1) an external inspection by the proficiency officer, range officer, firearms instructor, or gunsmith to determine the safety and functioning of the weapon(s);

(2) a proficiency demonstration in the care and cleaning of the weapon(s) used; and

(3) a course of fire that meets or exceeds the minimum standards.

(c) The minimum standards for the annual firearms proficiency course of fire shall be:

(1) handguns - a minimum of 50 rounds, including at least five rounds of duty ammunition, fired at ranges from point-blank to at least 15 yards with at least 20 rounds at or beyond seven yards, including at least one timed reload;

(2) shotguns - a minimum of five rounds of duty ammunition fired at a range of at least 15 yards;

(3) precision rifles - a minimum of 20 rounds of duty ammunition fired at a range of at least 100 yards; however, an agency may, in its discretion, allow a range of less than 100 yards but not less than 50 yards if the minimum passing percentage is raised to 90;

(4) patrol rifles - a minimum of 30 rounds of duty ammunition fired at a range of at least 50 yards, including at least one timed reload; however, an agency may, in its discretion, allow a range of less

than 50 yards but not less than 10 yards if the minimum passing percentage is raised to 90;

(5) fully automatic weapons - a minimum of 30 rounds of duty ammunition fired at ranges from seven to at least 10 yards, including at least one timed reload, with at least 25 rounds fired in full automatic (short bursts of two or three rounds), and at least five rounds fired semi-automatic, if possible with the weapon.

(d) The minimum passing percentage shall be 70 for each firearm.

(e) The executive director may, upon written agency request, waive a peace officer's demonstration of weapons proficiency based on a determination that the requirement causes a hardship.

(f) The effective date of this section is January 14, 2010. [~~June 1, 2004.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904020

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: October 25, 2009

For further information, please call: (512) 936-7713

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CHAPTER 221. PROFICIENCY CERTIFICATES AND OTHER POST-BASIC LICENSES

37 TAC §221.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §221.1, Proficiency Certificate Requirements. Subsection (a) is added to clarify proficiency certificates issued by the commission. Subsection (b) is amended to include the Firearms Proficiency for Juvenile Probation officers. Subsection (c) is amended to identify the items that cause an application to be refused. Subsection (d) is amended to allow for cancellation of unqualified certificates. Subsection (e) is amended to allow for cancellation of false applications. Subsection (f) is amended to specify that academic degrees must be from an accredited college or university. Subsection (g) is amended to reflect the effective date.

These amendments are necessary to incorporate the changes to Texas Occupations Code §1701.507, from House Bill 1237.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there may be an effect on state or local governments as a result of administering this section. The Texas Juvenile Probation Commission may be required to replace currently scheduled training sessions with firearms training courses and purchase ammunition. The Texas Juvenile Probation Commission may also decide to pay the application fee for all Juvenile Probation Officers.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by ensuring that Juvenile Probation Officers are armed to protect themselves and others they come in contact with during their duties.

The Commission has also determined that there may be a positive economic impact for small businesses. With more people eligible for certification, those businesses offering weapons qualification may see an increase in business.

The Commission has determined that there may be a monetary cost and time investment to the individual to achieve this proficiency certificate, however there will be a positive benefit for the individual and the public by allowing trained Juvenile Probation Officers to be armed so they may protect themselves and others they come in contact with during their duties.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.258, Firearms Training Program for Juvenile Probation Officers and §1701.402, Proficiency Certificates.

No other code, article, or statute is affected by this proposal.

§221.1. Proficiency Certificate Requirements.

(a) The commission shall issue proficiency certificates in accordance with the Texas Occupations Code §1701.402. Commission certificates issued pursuant to §1701.402 are neither required nor a prerequisite for establishing proficiency or training.

(b) [~~(a)~~] To qualify for proficiency certificates, applicants must meet all the following proficiency requirements:

(1) submit any required application currently prescribed by the commission, requested documentation, and any required fee;

(2) have an active license or appointment for the corresponding certificate (not a requirement for Mental Health Officer Proficiency, Retired Peace Officer and Federal Law Enforcement Officer Firearms Proficiency, Firearms Instructor Proficiency, Firearms Proficiency for Community Supervision Officers, Firearms Proficiency for Juvenile Probation Officers or Instructor Proficiency);

(3) officers licensed after the effective date of this rule must not currently have license(s) under suspension by the Commission;

(4) meet the continuing education requirements for the previous training cycle; and

(5) for firearms related certificates, not be prohibited by state or federal law or rule from attending training related to firearms or from possessing a firearm.

(c) [~~(b)~~] The commission may refuse an application if:

(1) an applicant has not been reported to the commission as meeting all minimum standards, including any training or testing requirements;

(2) an applicant has not affixed any required signature;

(3) required forms are incomplete;

(4) required documentation is incomplete, illegible, or is not attached; or

(5) an application contains a false assertion by any person.

(d) [~~(c)~~] The commission shall cancel and recall any certificate if the applicant was not qualified for its issue and it was issued:

(1) by mistake of the commission or an agency; or

(2) based on false or incorrect information provided by the agency or applicant.

(e) [~~(d)~~] If an application is found to be false, any license or certificate issued to the appointee by the commission will be subject to cancellation and recall.

(f) [~~(e)~~] Academic degree(s) must be issued by an accredited college or university.

(g) [~~(f)~~] The effective date of this section is January 14, 2010. [~~January 1, 2009.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904021

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: October 25, 2009

For further information, please call: (512) 936-7713

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37 TAC §221.3

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §221.3, Peace Officer Proficiency. Subsection (a)(2) is amended to incorporate the course requirements for Basic Peace Officer certificates. Subsection (b)(2) is amended for a grammatical change. Subsection (b)(3) is amended to incorporate the course requirements for Intermediate Peace Officer certificates. Subsection (c)(2) is amended to incorporate the course requirements for Advanced Peace Officer certificates. Subsection (c)(3) is amended for a grammatical change. Subsection (e) is amended to reflect the effective date.

These amendments are necessary to incorporate the changes to Texas Occupations Code §1701.402 from House Bill 3389, §17 and House Bill 4009, §6.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there may be an effect on state or local governments as a result of administering this section. Agencies may be required to replace currently scheduled training sessions with other training courses or add additional training courses.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by providing officers with training in cultural diversity and human trafficking, improving their effectiveness in serving their communities.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there may be a positive economic impact for small businesses offering training courses.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290 Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.402, Proficiency Certificates.

No other code, article, or statute is affected by this proposal.

§221.3. Peace Officer Proficiency.

(a) To qualify for a basic peace officer proficiency certificate, an applicant must meet all proficiency requirements including:

(1) one year experience as a peace officer; and

(2) successful completion of courses currently required by Texas Occupations Code §1701.402 and the commission.

[~~(2) successful completion of a field training course and a course that includes instruction provided by the employing agency on federal and state statutes that relate to employment issues affecting peace officers, including:~~]

[~~(A) civil service;~~]

[~~(B) compensation, including overtime compensation, and vacation time;~~]

[~~(C) personnel files and other employee records;~~]

[~~(D) management-employee relations in law enforcement organizations;~~]

[~~(E) work-related injuries;~~]

[~~(F) complaints and investigations of employee misconduct; and~~]

[~~(G) disciplinary actions and the appeal of disciplinary actions.~~]

(b) To qualify for an intermediate peace officer proficiency certificate, an applicant must meet all proficiency requirements including:

(1) a basic peace officer certificate;

(2) one of the following combinations of training hours or degrees and peace officer experience:

(A) 400 training hours and eight years,[~~;~~]

(B) 800 training hours and six years,[~~;~~]

(C) 1200 training hours and four years or an associate's degree and four years,[~~;~~] or

(D) 2400 training hours and two years or a bachelor's degree and two years; and[~~.~~]

(3) successful completion of courses currently required by Texas Occupations Code §1701.402 and the commission. [~~if the basic peace officer certificate was issued or qualified for on or after January~~

~~1, 1987, the licensee must also complete all of the current intermediate peace officer certification courses, which include:~~]

[~~(A) Child Abuse Prevention and Investigation;~~]

[~~(B) Crime Scene Investigation;~~]

[~~(C) Use of Force;~~]

[~~(D) Arrest, Search and Seizure;~~]

[~~(E) Spanish for Law Enforcement;~~]

[~~(F) Asset Forfeiture;~~]

[~~(G) Racial Profiling;~~]

[~~(H) Identity Theft; and~~]

[~~(I) Crisis Intervention Techniques.~~]

(c) To qualify for an advanced peace officer proficiency certificate, an applicant must meet all proficiency requirements including:

(1) an intermediate peace officer certificate;

(2) successful completion of courses currently required by Texas Occupations Code §1701.402 and the commission; and

(3) [~~(2)~~] one of the following combinations of training hours or degrees and peace officer experience:

(A) 800 training hours and 12 years,[~~;~~]

(B) 1200 training hours and nine years or an associate's degree and six years, or[~~;~~]

(C) 2400 training hours and six years or a bachelor's degree and five years.[~~; and~~]

[~~(3) If an Intermediate proficiency certificate was earned before September 1, 2006, complete the commission approved course of instruction in crisis intervention techniques.~~]

(d) To qualify for a master peace officer proficiency certificate, an applicant must meet all proficiency requirements including:

(1) an advanced peace officer certificate; and

(2) one of the following combinations of training hours or degrees and peace officer experience:

(A) 1200 training hours and 20 years or an associate's degree and 12 years,[~~;~~]

(B) 2400 training hours and 15 years or a bachelor's degree and nine years,[~~;~~]

(C) 3300 training hours and 12 years or a master's degree and seven years, or

(D) 4000 training hours and 10 years or a doctoral degree and five years.

(e) The effective date of this section is January 14, 2010. [~~March 1, 2008.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904022

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: October 25, 2009

For further information, please call: (512) 936-7713

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37 TAC §221.11

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §221.11, Mental Health Officer Proficiency. Subsection (a) is amended to include eligibility to individuals licensed as county jailers. Subsection (a)(7) is amended to reflect the correct title of the required training course. Subsection (b) is amended to reflect the effective date of the changes.

These amendments are necessary to incorporate the changes to Texas Occupations Code §1701.404 Certification of Officers for Mental Health Assignments from House Bill 2093.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there could be an effect on state or local governments as a result of administering this section. The demand for the training course could increase now that county jailers are eligible for this certificate.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by adding county jailers to the list of individuals eligible for this certificate.

The Commission has also determined that there may be a positive economic impact for small businesses. With more people eligible for certification, those businesses offering mental health training courses may see an increase in business.

The Commission has determined that there will be a monetary and time cost to the individual to achieve this proficiency certificate, however there will be a positive benefit for the individual and the public by allowing more individuals to receive training about mental health issues.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290 Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.404, Certification of Officers for Mental Health Assignments.

No other code, article, or statute is affected by this proposal.

§221.11. Mental Health Officer Proficiency.

(a) To qualify for a mental health officer proficiency certificate, an applicant must meet the following requirements:

(1) currently appointed as a peace officer, county jailer, or justice of the peace;

(2) at least two years experience as a peace officer, county jailer, or justice of the peace;

(3) if not currently a commissioned peace officer or county jailer, an applicant must meet the current enrollment standards;

(4) if an applicant is a commissioned peace officer or county jailer, an applicant must not ever have had a license or certificate issued by the commission suspended or revoked;

(5) if an applicant is a commissioned peace officer or county jailer, an applicant must have met the continuing education requirements for the previous training cycle;

(6) successful completion of a training course in emergency first aid and lifesaving techniques (Red Cross or equivalent); and

(7) successful completion of the current mental health [~~peace~~] officer training course and pass the approved examination for mental health officer proficiency.

(b) The effective date of this section is January 14, 2010. [~~March 1, 2001.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904023
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 936-7713

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37 TAC §221.35

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes new §221.35, Firearms Proficiency for Juvenile Probation Officers. Subsection (a) identifies the requirements for obtaining this proficiency certificate. Subsection (b) identifies the weapons proficiency requirements for juvenile probation officers. Subsection (c) identifies the expiration date for certificates issued under this section and stipulates requirements for renewal of the certificate for juvenile probation officers. Subsection (d) establishes the effective date of the section.

This proposal is necessary to incorporate the changes to Texas Occupations Code §1701.507 from House Bill 1237.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there may be an effect on state or local governments as a result of administering this section. The Texas Juvenile Probation Commission may be required to replace currently scheduled training sessions with firearms training courses and purchase ammunition. The Texas Juvenile Probation Commission may also decide to pay the application fee for all Juvenile Probation Officers.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by ensuring that Juvenile Probation Officers are armed to protect themselves and others they come in contact with during their duties.

The Commission has also determined that there may be a positive economic impact for small businesses. With more people eligible for certification, those businesses offering weapons qualification may see an increase in business.

The Commission has determined that there may be a monetary cost and time investment to the individual to achieve this proficiency certificate, however there will be a positive benefit for the individual and the public by allowing trained Juvenile Probation Officers to be armed so they may protect themselves and others they come in contact with during their duties.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290 Ste. 200, Austin, TX 78723-1035.

The new section is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The new section as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.258, Firearms Training Program for Juvenile Probation Officers.

No other code, article, or statute is affected by this proposal.

§221.35. Firearms Proficiency for Juvenile Probation Officers.

(a) To qualify for a firearms proficiency for juvenile probation officers certificate, an applicant must meet the following requirements, including:

(1) current employment as a juvenile probation officer by the Texas Juvenile Probation Commission; and

(2) successful completion of the commission's current firearms training program for juvenile probation officers.

(b) The holder of a certificate issued under this section must meet the firearms proficiency requirements at least once every 12 months.

(c) Certificates issued under this section expire two years from the date of issuance. Upon the expiration of a certificate, a juvenile probation officer may apply for the issuance of a renewal. Juvenile probation officers must meet the requirements in subsections (a)(1) and (b) of this section in order to renew the certificate.

(d) The effective date of this section is January 14, 2010.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904024
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 936-7713

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CHAPTER 223. ENFORCEMENT

37 TAC §223.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §223.1, License Action and Notification. Subsection (a) is amended to identify violations by a licensee that the Commission may take action on. Subsection (d) is amended to reflect the effective date.

These amendments are necessary to incorporate the changes to Texas Occupations Code §1701.501 from House Bill 3389, §22.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by ensuring that all agencies are in compliance with the incident-based reporting requirements

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290 Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.501, Disciplinary Action.

No other code, article, or statute is affected by this proposal.

§223.1. License Action and Notification.

(a) The commission shall revoke or suspend a license, place on probation a person whose license has been suspended, or reprimand a license holder for a violation of:

(1) Texas Occupations Code, Chapter 1701;

(2) the reporting requirements provided by Articles 2.132 and 2.134, Code of Criminal Procedure; or

(3) a commission rule.

[(a) The commission may take the following disciplinary actions against individuals licensed under the Occupations Code, Chapter 1701:]

[(1) written reprimand;]

[(2) suspension; or]

[(3) revocation.]

(b) The holder of a commission issued license or certificate must be sent notice of any hearing, or other action or matter before the commission at:

(1) the address of the agency shown in commission records to have the holder under current or last appointment;

(2) the address shown on the Texas driver's license record of the holder; or

(3) any other address requested by the holder in a written request to the executive director.[;]

(c) An action by the commission to deny, suspend, or revoke one license will, if so pled, also operate against any other commission license or certificate held by the same person.

(d) The effective date of this section is January 14, 2010. [March 1, 2001.]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904025
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 936-7713

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37 TAC §223.2

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes new §223.2, Administrative Penalties. Subsection (a) identifies that law enforcement or governmental agencies are subject to an administrative penalty. Subsection (b) identifies notification requirements of an administrative penalty. Subsection (c) identifies the criteria used to determine administrative penalties. Subsection (d) reflects the effective date.

This new section is necessary to incorporate the changes to Texas Occupations Code §1701.507, from House Bill 3389, Section 23.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be an effect on state or local governments as a result of administering this section. This cost will only be incurred by agencies that violate Texas Occupations Code, Chapter 1701 or commission rules.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by the Commission having another option to encourage agencies to comply with statutory requirements.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E Highway 290, Ste. 200, Austin, TX 78723-1035.

The new section is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The new section as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.507, Administrative Penalties.

No other code, article, or statute is affected by this proposal.

§223.2. Administrative Penalties.

(a) In addition to other penalties imposed by law, a law enforcement agency or governmental entity that violates this chapter or a rule adopted under this chapter is subject to an administrative penalty in an amount set by the commission not to exceed $1,000 per day per violation. The administrative penalty shall be assessed in a proceeding conducted in accordance with Chapter 2001, Government Code.

(b) The commission shall provide notice to the law enforcement agency a range of penalties that apply to the specific alleged violation(s) and the criteria used to determine the amount of the proposed administrative penalty.

(c) The amount of the penalty shall be based on:

(1) the seriousness of the violation;

(2) the respondent's history of violations;

(3) the amount necessary to deter future violations;

(4) efforts made by the respondent to correct the violation; and

(5) any other matter that justice may require.

(d) The effective date of this section is January 14, 2010.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904026
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 936-7713

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37 TAC §223.15

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §223.15, Suspension of License. Subsection (a)(3) is amended to identify convictions that would cause the commission to take action against a licensee. Subsection (a)(4) is amended to identify court ordered community supervision situations that would cause the commission to take action against a licensee. Subsection (r) is amended to reflect the effective date.

These amendments are necessary to incorporate the changes to Texas Occupations Code §1701.1524, from House Bill 3389, Section 7.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by identifying the convictions and court ordered community supervision situations that would cause the commission to take action against a licensee.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.1524, Rules Relating to Consequences of Criminal Conviction or Deferred Adjudication.

No other code, article, or statute is affected by this proposal.

§223.15. Suspension of License.

(a) Unless revocation is explicitly authorized by law, the commission may suspend any license issued by the commission if the licensee:

(1) violates any provision of these sections;

(2) violates any provision of the Texas Occupations Code, Chapter 1701;

(3) is convicted of any Class B misdemeanor or above [~~a criminal offense~~];

(4) is charged with the commission of any Class B misdemeanor or above [~~a misdemeanor~~], adjudication is deferred, and the licensee receives probation or court-ordered community supervision [~~is placed on community supervision~~]; or

(5) has previously received two written reprimands from the commission.

(b) The commission may suspend a license even though it may have become inactive by some other means, such as:

(1) expiration;

(2) voluntary surrender;

(3) two-year break in service; or

(4) any other means.

(c) If a licensee is charged with the commission of a felony, adjudication is deferred, and the licensee is placed on community supervision, the commission shall immediately suspend any license held for a period of 20 years. The suspension of any license under this subsection is effective immediately when the commission receives a certified copy of a court's judgment and issues notice to the licensee via certified mail that any license held is suspended.

(d) If a judgment and sentence is entered resulting in a misdemeanor conviction above the grade of a Class C misdemeanor, the term of suspension shall be ten years.

(e) The commission may suspend for not less than six months and not more than 24 months the license of a person convicted of a

Class C misdemeanor that was directly related to the duties and responsibilities of office, after the commission has considered, where applicable, the factors listed in the revocation section.

(f) If the court's judgment or adjudication is deferred for any misdemeanor above the grade of Class C misdemeanor or any family violence offense; and the licensee is then placed on community supervision, the term of suspension shall be equal to the actual time served on community supervision.

(g) If a license can be suspended for a community supervision or misdemeanor conviction, the commissioners may, in their discretion and upon proof of mitigating factors, either:

(1) probate all or part of the suspension term during a probation term of up to twice the maximum suspension term; or

(2) issue a written reprimand in lieu of suspension.

(h) If a license can be suspended for any other reason, the commission, through its executive director may, in its discretion and upon proof of the same mitigating factors, either:

(1) probate all or part of the suspension term during a probation term of up to twice the maximum suspension term; or

(2) issue a written reprimand in lieu of suspension.

(i) In evaluating whether mitigating circumstances exist, the commission will consider the following factors:

(1) the licensee's history of compliance with the terms of community supervision;

(2) the licensee's continuing rehabilitative efforts not required by the terms of community supervision;

(3) the licensee's employment record;

(4) whether the disposition offense contains an element of actual or threatened bodily injury or coercion against another person under the Texas Penal Code or the law of the jurisdiction where the offense occurred;

(5) the required mental state of the disposition offense;

(6) whether the conduct resulting in the arrest resulted in the loss of or damage to property or bodily injury;

(7) the type and amount of restitution made by the licensee;

(8) the licensee's prior community service;

(9) the licensee's present value to the community; and

(10) the licensee's post-arrest accomplishments.

(j) A suspension or probation may be ordered to run concurrently or consecutively with any other suspension or probation. The beginning date of a probation must be within the term of suspension. The beginning date of the suspension shall be:

(1) any date agreed to by both parties, which is no earlier than the date of the rule violation;

(2) the date the licensee notifies the commission in writing of the rule violation if the commission later receives a signed waiver of suspension from the licensee that was postmarked within 30 days of its receipt;

(3) the date the commission final order is entered in a contested case or the date it becomes effective, if that order is appealed.

(k) The executive director shall inform the commissioners of any such probation or reprimand no later than at their next regular meeting. If probated either way, a suspension may not be probated for less than six months.

(l) The commission may impose reasonable terms of probation, such as:

(1) continued employment requirements;

(2) special reporting conditions;

(3) special document submission conditions;

(4) voluntary duty requirements;

(5) no further rule or law violations; or

(6) any other reasonable term of probation.

(m) A probated license remains probated until:

(1) the term of suspension has expired;

(2) all other terms of probation have been fulfilled; and

(3) a written request for reinstatement has been received and accepted by the commission from the licensee unless the probation has been revoked by the commission for violation of probation; or

(4) until revoked.

(n) Twelve months may be added to the term of a new suspension for each separate previous violation that has resulted in either a license suspension, a probated suspension, or a written reprimand before the beginning date of the new suspension.

(o) Before reinstatement, the probation of a suspended license may be revoked upon a showing that any of its terms have been violated before the expiration date of the probation regardless of when the petition is filed. Upon revocation, the full term of suspension shall be imposed with credit for any time already served on that suspension.

(p) Once a license has been suspended, the suspension probated, the probation revoked, or the licensee reprimanded, the commission shall send, by regular mail, notice of the action to the chief administrator of any agency shown to have the licensee under either current or latest appointment.

(q) A suspended license remains suspended until:

(1) the term of suspension has expired and the term of court-ordered community supervision has been completed; and

(2) a written request for reinstatement has been received from the licensee and accepted by the commission; or

(3) the remainder of the suspension is probated and the license is reinstated.

(r) The effective date of this section is January 14, 2010. [~~July 6, 2009.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 14, 2009.

TRD-200904027

Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: October 25, 2009
For further information, please call: (512) 936-7713

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 16. ECONOMIC REGULATION

PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 401. ADMINISTRATION OF STATE LOTTERY ACT

SUBCHAPTER B. LICENSING OF SALES AGENTS

16 TAC §401.153

Proposed amended §401.153, published in the March 6, 2009, issue of the *Texas Register* (34 TexReg 1543), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on September 10, 2009.

TRD-200903981

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CHAPTER 402. CHARITABLE BINGO ADMINISTRATIVE RULES

SUBCHAPTER A. ADMINISTRATION

16 TAC §402.104

Proposed new §402.104, published in the March 6, 2009, issue of the *Texas Register* (34 TexReg 1544), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on September 10, 2009.

TRD-200903980

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS AND INVASIVE PLANTS SUBCHAPTER R. FORMOSAN TERMITE QUARANTINE

4 TAC §19.181

The Texas Department of Agriculture (the department) adopts an amendment to §19.181, concerning a quarantine for the Formosan subterranean termite, *Coptotermes formosanus* Shiraki, without changes to the proposed text as published in the July 31, 2009, issue of the *Texas Register* (34 TexReg 4986).

The amendment is adopted to add Brazos, Chambers, Comal, Fort Bend and Nacogdoches counties to the list of subterranean termite-infested counties in Texas. The Texas A&M University recently informed the department that the subterranean termite infestations were detected in these five counties since publication of the list of the 25 termite-infested counties in the August 11, 2006, issue of the *Texas Register* (31 TexReg 6297).

The amended section was adopted on an emergency basis on June 16, 2009, as published in the July 3, 2009, issue of the *Texas Register* (34 TexReg 4389). The department believes that restriction on the movement of quarantined articles from these five counties would delay the spread of this termite into free areas of Texas. The department further believes that it is necessary to take this action to reduce spread of the Formosan subterranean termite into free areas of Texas.

The amendment to §19.181 adds Brazos, Chambers, Comal, Fort Bend and Nacogdoches counties to the list of the Formosan subterranean termite-infested counties in Texas.

No comments were received on the proposal.

The amendment to §19.181 is adopted under the Texas Agriculture Code (the Code) §71.002, which provides the department with the authority to quarantine an area if it determines that a dangerous insect pest or plant disease not widely distributed in this state exists within an area of the state; the Code, §71.003, which provides the department with the authority to declare an area pest-free and quarantine surrounding areas if it determines that an insect pest or plant disease of general distribution in this state does not exist in an area; and the Code, §71.007, which authorizes the department to adopt rules as necessary to protect agricultural and horticultural interests, including rules to provide for a specific treatment of quarantined articles.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 10, 2009.

TRD-200903982
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: October 13, 2009
Proposal publication date: July 31, 2009
For further information, please call: (512) 463-4075

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TITLE 16. ECONOMIC REGULATION

PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 45. MARKETING PRACTICES SUBCHAPTER E. MISCELLANEOUS DIVISION 1. DELINQUENT LIST

The Texas Alcoholic Beverage Commission (Commission) adopts the repeal of §45.121, relating to delinquent list, without changes and adopts the new §45.121, relating to credit restrictions and delinquent list for liquor, with changes to the proposed text as published in the June 5, 2009, issue of the *Texas Register* (34 TexReg 3489).

Section 102.32 of the Texas Alcoholic Beverage Code (Code) provides that no seller may sell and no retailer may purchase liquor except for cash or on terms requiring payment on or before the 25th of the month for purchases made between the 1st and the 15th of the month and on or before the 10th day of the following month for purchases made between the 16th and the last day of the month. The section requires records of deliveries and purchases. The section also requires a seller to immediately report when a retailer becomes delinquent on an account and prohibits sales of any liquor to a retailer who is delinquent until the account is paid in full. An account becomes delinquent under subsection (d) of the statute if it is not paid as required by subsection (c). A seller who violates the section commits an offense under the Code. The section was amended by HB 2560, 81st Legislative Session (2009), which added §102.32(d-1). The amendment prohibits the Commission from accepting a voluntary cancellation or suspension from a retailer who is delinquent. It also disqualifies a retailer from holding another permit if the re-

tailer's permit was cancelled or expired while the retailer was delinquent on an account, until all delinquencies are satisfied.

Existing §45.121 is repealed and replaced with adopted new §45.121.

The new section reorganizes the content of the existing rule, updates the text of the rule to a plain language standard, and equalizes the duties of sellers and retailers for avoiding credit law violations. It additionally implements the amendment to §102.32(b-1).

Comments were received from individuals and representatives of the following industry members; the Texas Package Store Association, the Texas Restaurant Association, the Texas Petroleum and Convenience Store Association, the Greater Austin Merchants Association, the Northern Texas Trade Association, the South Texas Merchants Association and the Greater Houston Retailers Association. Comments were also received from agency staff.

Comment: Regarding §45.121(b) agency staff requested that definitions be added for delinquent payment, event, and incident.

Response: The Commission agrees with the comment. The terms were added to the definition subsection to provide clarity to the rule.

Comment: Regarding §45.121(d)(2) agency staff suggested that since HB 2560 made the disqualification mandatory the subsection was no longer needed in the rule.

Response: The Commission agrees in part and disagrees in part. The Commission agrees that making the disqualification for a permit mandatory in the Code for a credit law violation requires that the rule be changed from the proposed discretionary language. Most reasons for mandatory or discretionary refusals are located in the general provisions Chapters 11 and 61, or in the chapters providing authority for each permit. Because this is a significant change, and because it is not located in the usual places, the Commission has determined that the subsection, as changed should be retained in the rule text.

Comment: Regarding §45.121(e)(1) staff commented that the proposed language was too limiting and should be more general to allow the Commission to change forms and the web based reporting system.

Response: The Commission agrees and the rule was changed.

Comment: Regarding §45.121(e)(3) one commenter suggested that the two day reporting imposes a specific time requirement that is not necessary to accomplish the purpose of ensuring that delinquent reports and payments are timely and accurately filed before the publication of the delinquent list.

Response: The Commission agrees with the comment and the rule was changed.

Comment: Regarding §45.121(h), Commission staff commented that because paper documents are no longer routinely required as a part of the reporting requirements, a person requesting an exception should be required to submit documents and records tending to support the exception.

Response: The Commission agrees with the comment and greater detail was added to provide examples of the kind of documents or records that the Commission would consider to evaluate the exception.

Comment: Regarding §45.121(i), Commission staff suggested that "repeat" be changed to read "one or more" to allow the Commission to consider not just how many delinquencies occurred but also the dollar amounts.

Response: The Commission agrees with the comment and the rule has been changed.

Comment: Regarding §45.121(j), many comments were received requesting that the dates the delinquent list is published remain the same as they were in the previous rule, or in the alternative that the implementation of a shorter time frame be phased in over time.

Response: The Commission agrees in part and disagrees in part. The publication dates in the proposed rule accurately reflect the dates in §102.32(c) of the Code. The reason the time was extended for 10 days in the repealed rule was to allow the Commission the time needed to compile the information, to data-enter all of the paper reports and supporting documents, and to ensure accuracy before publication of the delinquent list. The direct submission of information by industry has eliminated the paper process and the delay no longer justifies a conflict between the statute and the rule. However, because systems have been structured around the time delays the Commission has agreed to a step down period. The rule will be amended to subtract 2 days from the publication date each year until the publication date of the delinquent list will be the same as the Code requires.

Comment: Regarding §45.121(j)(4) staff commented that the web-based system could be continuously updated, regardless of whether the Commission was open. Additionally, the continuous updates are for payments received; violations are only reported on the date the delinquent list is published.

Response: The Commission agrees and the rule text was changed.

16 TAC §45.121

The repeal is adopted under the authority of §5.31 and §102.32 of the Alcoholic Beverage Code. Section 5.31 gives the commission authority to prescribe and publish rules necessary to carry out the provisions of Code. Section 102.32 provides the specific authority to adopt these rules to give effect to the section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 8, 2009.

TRD-200903954
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Effective date: September 28, 2009
Proposal publication date: June 5, 2009
For further information, please call: (512) 206-3204

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16 TAC §45.121

The new rule is adopted under the authority of §5.31 and §102.32 of the Alcoholic Beverage Code. Section 5.31 gives the commission authority to prescribe and publish rules necessary to carry

out the provisions of Code. Section 102.32 provides the specific authority to adopt these rules to give effect to the section.

§45.121. Credit Restrictions and Delinquent List for Liquor.

(a) Purpose. This rule implements §§102.32, 11.61(b)(2), and 11.66 of the Texas Alcoholic Beverage Code (Code).

(b) Definitions.

(1) Alcoholic beverage--As used in this section includes only liquor, as that term is defined in §1.04 of the Code.

(2) Cash equivalent--A financial transaction or instrument that is not conditioned on the availability of funds upon presentment, including, money order, cashier's check, certified check or completed electronic funds transfer.

(3) Delinquent payment--A financial transaction or instrument that fails to provide payment in full or is returned to the Seller as unpaid for any reason, on or before the day it is required to be paid by §102.32(c) of the Code.

(4) Event--A financial transaction or instrument that fails to provide payment to a Retailer and results in a Retailer making one or more delinquent payments to one or more Sellers.

(5) Incident--A single delinquent payment.

(6) Retailer--A package store permittee, wine only package store permittee, private club permittee, private club exemption certificate permittee, mixed beverage permittee, or other retailer, and their agents, servants and employees.

(7) Seller--A wholesaler, class B wholesaler, winery, wine bottler, or local distributor and their agents, servants and employees.

(c) Invoices. A delivery of alcoholic beverages by a Seller, to a Retailer, must be accompanied by an invoice of sale showing the name and permit number of the Seller and the Retailer, a full description of the alcoholic beverages, the price and terms of sale, and the place and date of delivery.

(1) The Seller's copy of the invoice must be signed by the Retailer to verify receipt of alcoholic beverages and accuracy of invoice.

(2) The Seller and Retailer must retain invoices in compliance with the requirements of §206.01 of the Code.

(3) Invoices may be created, signed and retained in an electronic or internet based inventory system, and may be retained on or off the licensed premise.

(d) Delinquent Payment Violation. A Retailer who makes a delinquent payment to a Seller for the delivery of alcoholic beverages violates this section unless an exception applies.

(1) A Retailer who violates this section must pay a delinquent amount, and a Seller may accept payment, only in cash or cash equivalent financial transaction or instrument.

(2) A Retailer whose permit or license is cancelled for cause, voluntarily cancelled, expires, suspended or placed in suspension while on the delinquent list will be disqualified from applying for or being issued an original or renewal permit or license until all delinquent payments are satisfied. For purposes of this section, the Retailer includes all persons who were owners, officers, directors and shareholders of the Retailer at the time the delinquency occurred.

(e) Reporting Violation and Payment; Failure to Report.

(1) A report of a violation or payment must be submitted electronically to the commission on the commission's web based reporting system at www.tabc.state.tx.us

(2) A Seller who cannot access the commission's web based reporting system must either:

(A) submit a request for exception to submit reports by paper; or

(B) contract with another seller or service provider to make electronic reports on behalf of the Seller.

(3) All reports of violations or payment under this subsection must be made to the commission on or before the date the delinquent list is published.

(4) A Seller who fails to report a violation or a payment as required by this subsection is in violation of this section.

(f) Prohibited Sales and Delivery.

(1) Sellers are prohibited from selling or delivering alcoholic beverages to any licensed location of a Retailer who appears on the commission's Delinquent List from the date the violation appears on the Delinquent List until the Release Date on Delinquent List, or the Retailer no longer appears on the Delinquent List.

(2) A sale or delivery of alcoholic beverages prohibited by this section is a violation of this section.

(g) Prohibited Purchase or Acceptance.

(1) A Retailer who violates subsection (d) of this section is prohibited from purchasing or accepting delivery of alcoholic beverages from any source to any of Retailer's licensed locations from the date any violation occurs until all delinquent payment are paid in full.

(2) A prohibited purchase or acceptance of a delivery of alcoholic beverages is a violation of this section.

(h) Exception. A Retailer who wishes to dispute a violation of this section or inclusion on the commission's Delinquent List, based on a good faith dispute between the Retailer and the Seller may submit a detailed electronic or paper written statement with the commission with an electronic or paper copy to the Seller explaining the basis of the dispute.

(1) The written statement must be submitted with documents and/or other records tending to support the Retailer's dispute, which may include:

(A) a copy of the front and back of the cancelled check of Retailer showing endorsement and deposit by Seller;

(B) bank statement or records of bank showing funds were available in the account of Retailer on the date the check was delivered to Seller; and

(C) bank statement or records showing bank error or circumstances beyond the control of Retailer caused the check to be returned to Seller unpaid, or

(D) bank statement or records showing the check cleared Retailer's account and funds were withdrawn from Retailer's account in the amount of the check.

(2) A disputed delinquent payment will not be removed from the delinquent list until documents and/or other records tending to support the Retailer's dispute are submitted to the commission.

(3) The Retailer must immediately submit an electronic notice of resolution of a dispute to the commission under this subsection.

(i) Penalty for Violation. An action to cancel or suspend a permit or license may be initiated under §11.61(b)(2) of the Code for one or more violations of this section. The commission may consider whether the violation(s) is/are the result of an event or incident when initiating an action under this subsection.

(j) Delinquent List.

(1) The Delinquent List is published bi-monthly on the commission's public web site at http://www.tabc.state.tx.us. An interested person may receive the Delinquent List by electronic mail each date the Delinquent List is published by registering for this service online.

(2) The Delinquent List will be published the 5th day of the month for purchases made from the 1st to the 15th day of the preceding month, for which payment was not made on or before the 25th day of the preceding month. The Delinquent List will be published the 20th day of the month for purchases made between the 16th and the last day of the preceding month for which payment was not made on or before the 10th day of the month.

(3) The Delinquent List is effective at 12:01 A.M. on the date of publication.

(4) The Delinquent List is updated hourly to reflect reports of payments submitted.

(k) Calculation of Time. A due date under this section or §102.32(c) of the Code or the publication date of the Delinquent List that would otherwise fall on a Saturday, Sunday or a state or federal holiday, will be the next regular business day. A payment sent by U.S. postal service or other mail delivery service is deemed made on the date postmarked or proof of date delivered to the mail delivery service. A payment hand delivered to an individual authorized to accept payment on behalf of the Seller is deemed made when the authorized individual takes possession of the payment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 8, 2009.

TRD-200903956
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Effective date: September 28, 2009
Proposal publication date: June 5, 2009
For further information, please call: (512) 206-3204

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 409. MENTAL HEALTH SERVICES--MEDICAID PROGRAMS

SUBCHAPTER B. ADVERSE ACTIONS

25 TAC §§409.31 - 409.35

The Executive Commissioner of the Health and Human Services Commission (HHSC) on behalf of the Department of State Health Services (department) adopts the repeal of §§409.31 - 409.35, concerning adverse actions for the Mental Health Services Medicaid Programs, without changes to the proposal as published in the June 5, 2009, issue of the *Texas Register* (34 TexReg 3494) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

These rules adopted by the former Texas Department of Mental Health and Mental Retardation (TDMHMR) were part of a broader set of rules that addressed fraud, abuse, and recovery of Medicaid payments, adverse actions and sanctions, and processes for requesting an administrative hearing. At the time they were adopted, these rules were necessary to fulfill the obligations of the former TDMHMR in administering the Mental Health Services Medicaid Programs. House Bill 2292, 78th Legislature, Regular Session (2003), effective September 1, 2004, resulted in the consolidation of organizational structure and functions of the health and human services agencies. As part of that consolidation, responsibility for matters relating to Medicaid program integrity, including administrative enforcement, sanctions, damages, and penalties, was made the exclusive jurisdiction of the Office of Inspector General (OIG) at HHSC. Also, at the time of the consolidation, these former TDMHMR rules were transferred to the department.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has determined that there is no need to retain the rules in Chapter 409, Subchapter B, because they have been superseded by the OIG rules in 1 TAC Chapter 371, Subchapter G, relating to Medicaid and Other Health and Human Services Fraud and Abuse Program Integrity.

SECTION-BY-SECTION SUMMARY

The rules concern the application of the rules, definitions, notice of adverse actions, request for an administrative hearing, and withholding provider agreement payments.

COMMENTS

The department, on behalf of HHSC, did not receive any comments regarding the proposed repeal during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the repeal, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The repeals are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 10, 2009.

TRD-200903975
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: September 30, 2009
Proposal publication date: June 5, 2009
For further information, please call: (512) 458-7111

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 21. TRADE PRACTICES

The Commissioner of Insurance adopts amendments to §§21.3502, 21.3510 - 21.3513, 21.3515 - 21.3518, 21.3540, and 21.3543, concerning exclusion of certain state-mandated health benefits in consumer choice health benefit plans, and new §§21.4401 - 21.4404, concerning mandated health benefit plan coverage for autism spectrum disorder coverage. Section 21.4402 and §21.4403 are adopted with changes to the proposed text published in the April 3, 2009, issue of the *Texas Register* (34 TexReg 2217). Sections 21.3502, 21.3510 - 21.3513, 21.3515 - 21.3518, 21.3540, 21.3543, 21.4401, and 21.4404 are adopted without changes.

REASONED JUSTIFICATION. The adopted amendments and new sections implement (i) House Bill (HB) 1919, 80th Legislature, Regular Session, effective January 1, 2008, relating to required autism spectrum disorder coverage for certain children; (ii) HB 1485, 79th Legislature, Regular Session, effective September 1, 2005, relating to the state-mandated-offer-of or the state-mandated-coverage-of serious mental illness in consumer choice health benefit plans; and (iii) HB 1030, 79th Legislature, Regular Session, effective September 1, 2005, relating to an insured's coinsurance amount applicable to payment to a non-preferred provider. The adopted amendments are necessary to: (i) update existing rules relating to the exclusion of certain state-mandated health benefits in consumer choice health benefit plans; (ii) update obsolete statutory citations to the Insurance Code as a result of the enactment of the non-substantive revision of the Insurance Code; and (iii) correct citation style errors. New Subchapter JJ, consisting of §§21.4401 - 21.4404, is necessary to implement §1355.015 of the Insurance Code, which requires that health benefit plans provide autism spectrum disorder coverage for certain children.

A public hearing on the rule proposal was held on June 17, 2009. No public comments were received at the hearing. In response to written comments on the published proposal, the Department has changed some of the proposed language in the text of the rule as adopted. None of the changes made to the proposed text materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

The following changes are made to the proposed text as a result of comments.

The Department has revised the definition of "primary care physician" in §21.4402(7) as adopted to provide that if an enrollee's health benefit plan does not contain provisions concerning selection or designation of a primary care physician, a primary care physician is "a physician selected or otherwise designated by the enrollee or the enrollee's parent or guardian to develop a treatment plan for the purpose of treating autism spectrum disorder." The Department has added the words "by the enrollee or the enrollee's parent or guardian" in response to comments requesting that the rules ensure that health benefit plans cannot select or designate an enrollee's primary care physician. The purpose of this change is to ensure that the adopted rules do not inadvertently give a health benefit plan the ability to designate an enrollee's primary care physician in instances where selection or designation of the enrollee's primary care physician is not addressed within the health benefit plan policy or evidence of coverage.

The Department has revised §21.4403(a)(1) as adopted to provide that "[a]t a minimum, a health benefit plan must provide coverage as provided by the Insurance Code §1355.015 to an enrollee described by Insurance Code §1355.015(a). The Department has also revised §21.4403(a)(2) as adopted to provide that "[p]ursuant to the Insurance Code §1355.015(a), the health benefit plan is not precluded from providing coverage of treatment and services described by §1355.015(b) of the Insurance Code because an enrollee who is being treated for autism spectrum disorder becomes older than the age range specified by §1355.015(a)." These changes are made in response to a comment requesting that the Department withdraw the rule as a result of the enactment of HB 451, passed by the 81st Legislature, Regular Session, effective September 1, 2009. The Department does not agree that it is necessary to withdraw the rule proposal because of the enactment of HB 451. Existing §1355.015(a) provides that at a minimum, a health benefit plan must provide coverage as provided by §1355.015 to an enrollee older than two years of age and younger than six years of age who is diagnosed with autism spectrum disorder, and that if an enrollee who is being treated for autism spectrum disorder becomes six years of age or older and continues to need treatment, §1355.015(a) does not preclude coverage of treatment and services described by subsection (b) of §1355.015. Existing §1355.015(a) is applicable to a health benefit plan delivered, issued for delivery, or renewed on or after January 1, 2008. HB 451 amends §1355.015(a) to provide that, at a minimum, a health benefit plan must provide coverage as provided by §1355.015 to an enrollee who is diagnosed with autism spectrum disorder from the date of diagnosis until the enrollee completes nine years of age. HB 451 also amends §1355.015(a) to provide that if an enrollee who is being treated for autism spectrum disorder becomes 10 years of age or older and continues to need treatment, §1355.015(a) does not preclude coverage of treatment and services described by subsection (b) of §1355.015. Section 1355.015(a) as amended by HB 451 is applicable to a health benefit plan delivered, issued for delivery, or renewed on or after January 1, 2010. These changes in §1355.015(a) by HB 451 to raise the age requirements for children eligible for coverage for autism spectrum disorder treatment under §1355.015 are the only changes enacted by HB 451 that impact the rules as proposed. The revision of §21.4403(a)(1) and (2) as adopted to reference the applicable statutory provision is consistent both with existing §1355.015(a) and §1355.015(a) as amended by HB 451.

HB 1919, relating to required autism spectrum disorder coverage for certain children. HB 1919 amends Insurance Code Chapter 1355, which regulates benefits for certain mental disorders. HB 1919 enacts §1355.015 to include, as a state-mandated benefit, coverage for certain children for all generally recognized services prescribed in relation to autism spectrum disorder by an insured's primary care physician in the treatment plan recommended by that physician. As a result of the enactment of HB 1919, the Department adopts new Subchapter JJ, consisting of §§21.4401 - 21.4404, to implement the Insurance Code §1355.015. The new adopted sections do not impose any new or additional requirements to those in the statute. Pursuant to §1355.015(e), Chapter 1507 consumer choice health benefit plans are not required to provide the state-mandated coverage of autism spectrum disorder as required by the Insurance Code Chapter 1355, Subchapter A. It is, therefore, necessary to amend existing rules regulating consumer choice health benefit plans to provide that the state-mandated coverage of autism spectrum disorder as required by the Insurance Code Chapter 1355, Subchapter A, is not required to be offered or provided by these consumer choice health benefit plans.

The following paragraphs provide a brief summary as well as an analysis of the reasons for the adopted amendments and new sections necessitated by the enactment of HB 1919.

New Subchapter JJ consisting of §§21.4401 - 21.4404 is necessary to implement §1355.015 of the Insurance Code. Section 1355.015 requires that health benefit plans provide autism spectrum disorder coverage for certain children. The new sections simply set forth statutory provisions and provide necessary interpretations of those provisions. The new sections do not impose any new or additional requirements to those in the statute. New §21.4401 addresses the purpose and applicability of Subchapter JJ. New §21.4401(a) states that the subchapter implements those provisions of the Insurance Code Chapter 1355, Subchapter A, that relate to autism spectrum disorder coverage. The general purpose of the new subchapter is to ensure health benefit plan coverage for the early intervention, treatment, and services for certain child enrollees diagnosed with autism spectrum disorder in accordance with the Insurance Code Chapter 1355, Subchapter A. New §21.4401(b)(1) and (2) is necessary to address the applicability of the subchapter, specifying the types of health benefit plans to which Subchapter JJ does and does not apply.

New §21.4402 provides definitions of terms used in Subchapter JJ. The terms defined in the section include: "applied behavior analysis," "autism spectrum disorder," "enrollee," "generally recognized services," "health care practitioner," "neurobiological disorder," and "primary care physician."

New §21.4403 addresses required coverage for autism spectrum disorder in accordance with the Insurance Code §1355.015. New §21.4403(a)(1) is necessary to specify that, at a minimum, a health benefit plan must provide coverage as provided by the Insurance Code §1355.015 to an enrollee described by Insurance Code §1355.015(a). New §21.4403(a)(2) is necessary to provide that a health benefit plan is not precluded from providing coverage of treatment and services described by §1355.015(b) of the Insurance Code because an enrollee who is being treated for autism spectrum disorder becomes older than the age range specified by §1355.015(a).

In accordance with the Insurance Code §1355.015, new §21.4403(b) is necessary to clarify that a health benefit plan is not precluded from providing coverage of treatment and services described by §1355.015(b) of the Insurance Code for enrollees of other ages. New §21.4403(c) specifies that in accordance with the Insurance Code §1355.002 and §1355.015(b), a health benefit plan issuer must provide coverage as a medical and surgical benefit under the health benefit plan for all generally recognized services prescribed in relation to autism spectrum disorder by the enrollee's primary care physician in the treatment plan recommended by that physician. New §21.4403(d) specifies that pursuant to the Insurance Code §1355.015(d), coverage under the section may be subject to annual deductibles, copayments, and coinsurance that are consistent with annual deductibles, copayments, and coinsurance required for other coverage under the health benefit plan.

New §21.4404 addresses health care practitioners. Pursuant to the Insurance Code §1355.015(b), new §21.4404(a) specifies that, a health care practitioner providing treatment for autism spectrum disorder under Chapter 1355, Subchapter A, of the Insurance Code and proposed new Subchapter JJ must meet one of the following requirements: (i) be licensed, certified, or registered by an appropriate agency of this state; (ii) have professional credentials that are recognized and accepted by an appropriate agency of the United States; or (iii) be certified as a provider under the TRICARE military health system. In accordance with the Insurance Code §1355.015(b), new §21.4404(b) specifies that a health benefit plan issuer may not deny coverage for services for autism spectrum disorder on the basis that a health care practitioner providing applied behavior analysis does not hold a license issued by an agency of this state, as long the health care practitioner otherwise meets one of the requirements of the Insurance Code §1355.015(b).

Existing §§21.3510 - 21.3513 and §§21.3515 - 21.3518 specify state-mandated health benefits that are not required to be included in specific types of consumer choice benefit plans that may be provided under Insurance Code Chapter 1507. The amendments to these sections are necessary to update existing rules relating to the exclusion of certain state-mandated health benefits in consumer choice health benefit plans. The amendments simply reflect statutory provisions and do not impose any new or additional requirements to those in the statute. The Insurance Code in Chapter 1507, which regulates consumer choice health benefit plans, specifies those health benefit plans that are not required to offer or provide state-mandated health benefits, including individual indemnity policies, group association indemnity policies, small employer indemnity policies, large employer indemnity policies, individual HMO plans, group HMO plans, small employer HMO plans, and large employer HMO plans. Pursuant to §1507.001 and §1507.051, Chapter 1507 was enacted in recognition of the need for individuals, employers, and other purchasers of coverage in this state to have the opportunity to choose health insurance plans and health maintenance organization plans that are more affordable and flexible than policies offering accident and sickness insurance coverage and health care plans offered by health maintenance organizations available in the existing market. The purpose of Chapter 1507, therefore, is to increase the availability of health insurance coverage by allowing authorized insurers and health maintenance organizations to issue health plans that, in whole or in part, do not offer or provide state-mandated health benefits. Because of the §1355.015(e) provision that the statutorily mandated coverage of autism spectrum disorder does not apply to a standard health benefit plan provided under Chapter 1507, it is necessary to amend certain existing rules for consistency with §1355.015(e). The Insurance Code Chapter 1355, Subchapter A, applies to group health benefit plans. There are six types of

consumer choice group health benefit plans. However, pursuant to §1355.015(e), no consumer choice health benefit plans are required to include coverage of autism spectrum disorder as required by the Insurance Code Chapter 1355, Subchapter A. As a result, the following amendments are adopted to reflect this statutory exemption: (i) §21.3511(23) reflects the exemption for group association indemnity consumer choice health benefit plans; (ii) §21.3512(16) reflects the exemption for small employer group indemnity consumer choice health benefit plans; (iii) §21.3513(23) reflects the exemption for large employer group indemnity consumer choice health benefit plans; (iv) §21.3516(27) reflects the exemption for non-employer group HMO consumer choice health benefit plans; (v) §21.3517(20) reflects the exemption for small employer group HMO consumer choice health benefit plans; and (vi) §21.3518(27) reflects the exemption for large employer group HMO consumer choice health benefit plans.

HB 1485, relating to the state-mandated-offer-of or the state-mandated-coverage-of serious mental illness in consumer choice health benefit plans. It is also necessary to adopt amendments to existing rules to implement HB 1485, relating to the state-mandated-offer-of or the state-mandated-coverage-of serious mental illness in consumer choice health benefit plans. Enacted by the 79th Legislature, HB 1485 amended former Insurance Code Articles 3.80 §3 and 20A.09N(d), now §1507.003 and §1507.053, respectively. The 79th Legislature also enacted HB 2018 which, as part of the non-substantive revision of the Insurance Code, adopted without substantive change both Article 3.80 §3 as the Insurance Code §1507.003 and Article 20A.09N(d) as the Insurance Code §1507.053, effective September 1, 2005. The HB 1485 amendment to Article 3.80 §3 (now §1507.003) revised the definition of "state mandated benefits," to not include "coverage for serious mental illness under Subchapter A, Chapter 1355." Prior to the amendment, the term did not include coverage for serious mental illness "under Article 3.51-14, Insurance Code, if the standard health benefit plan is issued to a large employer as defined in Article 26.02, Insurance Code." The amendment updated the statutory reference and deleted the qualifying phrase "if the standard health benefit plan is issued to a large employer as defined in Article 26.02, Insurance Code." The result of this amendment is: (i) a small employer group indemnity consumer choice health benefit plan is required to include the offer of serious mental illness under Subchapter A, Chapter 1355; and (ii) a standard health benefit plan issued as part of a group association indemnity policy is required to include serious mental illness under Subchapter A, Chapter 1355. The HB 1485 amendment to Article 20A.09N(d) (now §1507.053) revised the definition of "state mandated benefits," to not include coverage for "serious mental illness under Subchapter A, Chapter 1355 of the Insurance Code." Prior to the amendment, the term did not include coverage for serious mental illness "under Article 3.51-14, Insurance Code, if the standard health benefit plan is issued to a large employer as defined in Article 26.02, Insurance Code." The amendment deleted the qualifying phrase "if the standard health benefit plan is issued to a large employer as defined in Article 26.02, Insurance Code." The result of this amendment is: (i) a small employer group Health Maintenance Organization (HMO) consumer choice health benefit plan is required to include the offer of serious mental illness under Subchapter A, Chapter 1355; and (ii) a non-employer group HMO consumer choice health benefit plan is required include serious mental illness under Subchapter A, Chapter 1355.

Prior to the HB 1485 amendments to Articles 3.80 §3 and 20A.09N(d), four types of consumer choice health benefit plans were not required to include either the state-mandated-offer-of or the state-mandated-coverage-of serious mental illness as required by the Insurance Code Article 3.51-14 (now Chapter 1355, Subchapter A, of the Insurance Code). As a result, the exemptions were reflected in §§21.3511(9), 21.3512(9), 21.3516(13), and 21.3517(13). Section 21.3511(9) provided that the state-mandated health coverage for serious mental illness was not required to be included in a group association indemnity consumer choice health benefit plan. Section 21.3512(9) provided that the state-mandated offer of health coverage for serious mental illness was not required to be included in a small employer group indemnity consumer choice health benefit plan. Therefore, when these state-mandated exemptions in §21.3511(9) and §21.3512(9) were originally adopted in 2004, the exclusions were consistent with the Insurance Code Article 3.80 §3 (now §1507.003 of the Insurance Code). Section 21.3516(13) provided that the state-mandated health coverage of serious mental illness was not required to be included in a non-employer group HMO consumer choice health benefit plan. Section 21.3517(13) provided that the state-mandated offer of health coverage for serious mental illness was not required to be included in a small employer group HMO consumer choice health benefit plan. Therefore, when these state-mandated exemptions in §21.3516(13) and §21.3517(13) were originally adopted in 2004, the exclusions were consistent with the Insurance Code Article 20A.09N(d) (now §1507.053 of the Insurance Code). All four of these exemptions are deleted in this adoption because the exemptions are no longer statutorily authorized pursuant to the Insurance Code §§1507.003 and 1507.053. The adopted deletions are necessary for consistency with statutory provisions revised by the enactment of HB 1485.

HB 1030, relating to an insured's coinsurance amount applicable to payment to a non-preferred provider. Deletion of some existing rules is necessary to implement HB 1030, enacted by the 79th Legislature, which added §1301.0046 to the Insurance Code. Section 1301.0046 provides that an insured's coinsurance amount applicable to payment to a non-preferred provider may not exceed 50 percent of the total covered amount applicable to the medical or health care services. The §1301.0046 coinsurance limitation supersedes the Department's rule in §3.3704(a)(6), relating to Freedom of Choice, Availability of Preferred Providers.

Prior to the enactment of HB 1030, the Insurance Code did not specify a specific percentage limit by which an insured's coinsurance amount applicable to payment to a non-preferred provider could exceed the total covered amount applicable to the medical or health care services. Therefore, pursuant to the Insurance Code Article 3.42(i)(2) (now §1701.055(a)(2)), the Department adopted a limit by rule in §3.3704(a)(6).

Section 3.3704(a)(6) specifies the basic level of coverage required for a preferred provider benefit plan to not be considered unjust or unfair discrimination under the Insurance Code. Section 3.3704(a)(6) provides that: "A preferred provider benefit plan shall not be considered unjust under the Insurance Code Article 3.42, or unfair discrimination under the Insurance Code Articles 21.21-6 or 21.21-8, or to violate Articles 3.70-2(B) or 21.52 of the Insurance Code provided that. . . (6) the basic level of coverage, excluding a reasonable difference in deductibles, is not more than 30% less than the higher level of coverage. A reasonable difference in deductibles shall be determined considering the benefits of each individual policy; . . . ." However, prior to this

adoption, §§21.3510 - 21.3513 specified exemptions for certain consumer choice health benefit plan to the limitations or restrictions on coinsurance imposed by §3.3704(a)(6) based on Chapter 1507 of the Insurance Code. As previously noted, Chapter 1507 of the Insurance Code regulates consumer choice health benefit plans. Section 1507.001 states the purpose of the chapter: "The legislature recognizes the need for individuals, employers, and other purchasers of coverage in this state to have the opportunity to choose health insurance plans that are more affordable and flexible than existing market policies offering accident and sickness insurance coverage. The legislature, therefore, seeks to increase the availability of health insurance coverage by allowing insurers authorized to engage in the business of insurance in this state to issue accident and sickness policies that, in whole or in part, do not offer or provide state-mandated health benefits." To meet the stated purpose of Chapter 1507 to provide for more affordable and flexible health insurance plans, the Department adopted the exemptions to §3.3704(a)(6) in §§21.3510 - 21.3513. These exemptions, which are deleted in this adoption, were specified in the following consumer choice health benefit plan rules: (i) §21.3510(5), individual indemnity consumer choice health benefit plans; (ii) §21.3511(5), group association indemnity consumer choice health benefit plans; (iii) §21.3512(5), small employer group indemnity consumer choice health benefit plans; and (iv) §21.3513(5), large employer group indemnity consumer choice health benefit plans. However, as a result of the enactment of HB 1030, it is no longer necessary to include exemptions to §3.3704(a)(6) in §§21.3510(5), 21.3511(5), 21.3512(5), and 21.3513(5). With the enactment of HB 1030, an insured's coinsurance amount applicable to payment to a non-preferred provider may not exceed 50 percent of the total covered amount applicable to the medical or health care services. As previously noted, the §1301.0046 coinsurance limitation is applicable to all health benefit plans, including consumer choice health benefit plans. Also, as previously noted, the §1301.0046 coinsurance limitation supersedes the §3.3704(a)(6) requirement. According to the Senate Research Center bill analysis for HB 1030, the purpose of the legislation is to provide more options for employers and individuals looking for affordable health insurance. (SENATE RESEARCH CENTER, BILL ANALYSIS (ENGROSSED)), HB 1030, 79TH Legislature, Regular Session effective September 1, 2005.) This purpose is consistent with the purpose of the Insurance Code Chapter 1507 as stated in §1507.001. Therefore, because the exemptions are no longer statutorily authorized and because HB 1030 addresses the purpose for adopting them, it is necessary to delete the exemptions in §§21.3510(5), 21.3511(5), 21.3512(5), and 21.3513(5) from the §3.3704(a)(6) requirement.

Update of obsolete statutory citations and conformation with current Department citation style. Amendments are also necessary to update obsolete statutory citations to the Insurance Code as a result of the enactment of the non-substantive revision of the Insurance Code. This will result in easier use and readability of the rules. Additionally, amendments are necessary throughout the amended sections to change references to "Insurance Code" to "the Insurance Code" to conform to current Department citation style. Amendments are adopted in the following sections to update statutory citations to conform with the non-substantive revised Insurance Code: §21.3502(3), (7), (10)(A)(ii) and (B); §21.3510(1) - (4); renumbered §21.3510(5) - (8), (11), and (13); §21.3511(1) - (4); renumbered §21.3511(5) - (7), (8) - (20), and (22); §21.3512(1) - (4); renumbered §21.3512(5) - (7), (8) - (13), and (15); §21.3513(1) - (4); renumbered §21.3513(5) - (20) and (22); §21.3515(1) - (7), (10) - (14), and (16); §21.3516(1) - (7) and (10) - (12); renumbered §21.3516(13) - (24) and (26); §21.3517(1) - (7) and (10) - (12); renumbered §21.3517(13) - (17) and (19); §21.3518(1) - (7), (10) - (24), and (26); §21.3540; and §21.3543(1)(A) and (B).

HOW THE SECTIONS WILL FUNCTION. Adopted §21.3511(23) provides that a group association indemnity consumer choice health benefit plan is not required to include coverage of autism spectrum disorder as required by the Insurance Code Chapter 1355, Subchapter A. Under adopted §21.3512(16), a small employer group indemnity consumer choice health benefit plan is not required to include coverage of autism spectrum disorder as required by the Insurance Code Chapter 1355, Subchapter A. Adopted §21.3513(23) provides that a large employer group indemnity consumer choice health benefit plan is not required to include coverage of autism spectrum disorder as required by the Insurance Code Chapter 1355, Subchapter A. A non-employer group HMO consumer choice health benefit plan is not required under adopted §21.3516(27) to include coverage of autism spectrum disorder as required by the Insurance Code Chapter 1355, Subchapter A. Under adopted §21.3517(20), a small employer group HMO consumer choice health benefit plan is not required to include coverage of autism spectrum disorder as required by the Insurance Code Chapter 1355, Subchapter A. A large employer group HMO consumer choice health benefit plan is not required under adopted §21.3518(27) to include coverage of autism spectrum disorder as required by the Insurance Code Chapter 1355, Subchapter A.

Adopted new Subchapter JJ implements the coverage for autism spectrum disorder mandated by HB 1919, 80th Legislature, Regular Session, effective January 1, 2008. Adopted new §21.4401 addresses the purpose and applicability of Subchapter JJ. Adopted §21.4401(a) states that the subchapter implements those provisions of the Insurance Code Chapter 1355, Subchapter A, that relate to autism spectrum disorder coverage. The general purpose of the proposed new subchapter is to ensure health benefit plan coverage for the early intervention, treatment, and services for certain child enrollees diagnosed with autism spectrum disorder in accordance with the Insurance Code Chapter 1355, Subchapter A. Adopted §21.4401(b)(1) and (2) addresses the applicability of the subchapter, specifying the types of health benefit plans to which Subchapter JJ does and does not apply.

New §21.4402 defines terms used in Subchapter JJ. The terms defined in the section include: "applied behavior analysis," "autism spectrum disorder," "enrollee," "generally recognized services," "health care practitioner," "neurobiological disorder," and "primary care physician."

New §21.4403 addresses required coverage for autism spectrum disorder. New §21.4403(a)(1) specifies that, at a minimum, a health benefit plan must provide coverage as provided by the Insurance Code §1355.015 to an enrollee described by Insurance Code §1355.015(a). New §21.4403(a)(2) provides that a health benefit plan is not precluded from providing coverage of treatment and services described by §1355.015(b) of the Insurance Code because an enrollee who is being treated for autism spectrum disorder becomes older than the age range specified by §1355.015(a).

New §21.4403(b) clarifies that a health benefit plan is not precluded from providing coverage of treatment and services described by the Insurance Code §1355.015(b) for enrollees of other ages. New §21.4403(c) specifies that in accordance with

the Insurance Code §1355.002 and §1355.015(b), a health benefit plan issuer must provide coverage as a medical and surgical benefit under the health benefit plan for all generally recognized services prescribed in relation to autism spectrum disorder by the enrollee's primary care physician in the treatment plan recommended by that physician. New §21.4403(d) specifies that pursuant to the Insurance Code §1355.015(d), coverage under the section may be subject to annual deductibles, copayments, and coinsurance that are consistent with annual deductibles, copayments, and coinsurance required for other coverage under the health benefit plan.

New §21.4404 addresses health care practitioners. New §21.4404(a) specifies that, pursuant to the Insurance Code §1355.015(b), a health care practitioner providing treatment for autism spectrum disorder under Chapter 1355, Subchapter A, of the Insurance Code and proposed new Subchapter JJ must meet one of the following requirements: (i) be licensed, certified, or registered by an appropriate agency of this state; (ii) have professional credentials that are recognized and accepted by an appropriate agency of the United States; or (iii) be certified as a provider under the TRICARE military health system. New §21.4404(b) specifies that a health benefit plan issuer may not deny coverage for services for autism spectrum disorder on the basis that a health care practitioner providing applied behavior analysis does not hold a license issued by an agency of this state, as long the health care practitioner otherwise meets one of the requirements of the Insurance Code §1355.015(b).

Several provisions are adopted with updated statutory citations to conform to the non-substantive revised Insurance Code. These provisions include: §21.3502(3), (7), (10)(A)(ii) and (B); §21.3510(1) - (8), (11), and (13); §21.3511(1) - (20) and (22); §21.3512(1) - (13) and (15); §21.3513(1) - (20) and (22); §21.3515(1) - (7), (10) - (14), and (16); §21.3516(1) - (7) and (10) - (24) and (26); §21.3517(1) - (7) and (10) - (17) and (19); §21.3518(1) - (7), (10) - (24), and (26); §21.3540; and §21.3543(1)(A) and (B).

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

General Comments

Withdrawal of the rule proposal

Comment: A commenter requests that the rule proposal be withdrawn because HB 451 was filed in the 2009 Texas Legislature, and the bill amends the existing law created by HB 1919 in order to change the age range of coverage for children with autism spectrum disorder. The commenter says that this change makes the proposed rule's interpretation of the covered ages null and void.

Agency Response: The Department disagrees with the commenter's suggestion to withdraw the rule proposal and declines to take this action. HB 451 was passed by the Texas Legislature and amends the existing law enacted by HB 1919 to change the age of coverage for children with autism spectrum disorder. As a result, the Department has modified the text of §21.4403(a)(1) as adopted to provide: "At a minimum, a health benefit plan must provide coverage as provided by the Insurance Code §1355.015 to an enrollee described by the Insurance Code §1355.015(a). Additionally, the Department has modified the text of §21.4403(a)(2) as adopted to provide: "Pursuant to the Insurance Code §1355.015(a), the health benefit plan is not precluded from providing coverage of treatment and services described by §1355.015(b) of the Insurance Code because an enrollee who is being treated for autism spectrum disorder becomes older than the age range specified by §1355.015(a)." Existing §1355.015(a) provides that at a minimum, a health benefit plan must provide coverage as provided by §1355.015 to an enrollee older than two years of age and younger than six years of age who is diagnosed with autism spectrum disorder, and that if an enrollee who is being treated for autism spectrum disorder becomes six years of age or older and continues to need treatment, §1355.015(a) does not preclude coverage of treatment and services described by subsection (b) of §1355.015. Existing §1355.015(a) is applicable to a health benefit plan delivered, issued for delivery, or renewed on or after January 1, 2008. HB 451 amends §1355.015(a) to provide that, at a minimum, a health benefit plan must provide coverage as provided by §1355.015 to an enrollee who is diagnosed with autism spectrum disorder from the date of diagnosis until the enrollee completes nine years of age. HB 451 also amends §1355.015(a) to provide that if an enrollee who is being treated for autism spectrum disorder becomes 10 years of age or older and continues to need treatment, §1355.015(a) does not preclude coverage of treatment and services described by subsection (b) of §1355.015. Section 1355.015(a) as amended by HB 451 is applicable to a health benefit plan delivered, issued for delivery, or renewed on or after January 1, 2010. The revision of §21.4403(a)(1) and (2) as adopted is consistent with the Insurance Code §1355.015(a) as enacted by HB 1919 and by HB 451.

Creation of a Resource Guide

Comment: Two hundred and two commenters ask that the Department work with stakeholders to create a Frequently Asked Questions list regarding autism coverage in Texas. Another commenter requests that the Department work in cooperation with health benefit plans, providers, and consumers to create and post a web-based resource guide or list of Frequently Asked Questions to provide specific guidance on implementation of HB 1919.

Agency Response: While the Department already has a web-based resource page addressing coverage for autism spectrum disorder, it does not currently contain a list of Frequently Asked Questions (FAQs). This is because the Department has not yet received enough inquiries regarding coverage for autism spectrum disorder with which to compile such a list. In accordance with the Department's current procedure, when enough such questions are received, a list of FAQs will be compiled and posted on the Department's web-based resource page addressing coverage for autism spectrum disorder.

§21.4401. Purpose and applicability

Comment: A commenter suggests striking the following statement from proposed §21.4401: "The general purpose of this subchapter is to ensure health benefit plan coverage for the early intervention, treatment, and services of certain children enrollees diagnosed with autism spectrum disorder, as provided in the Insurance Code Chapter 1355, Subchapter A." According to the commenter, the purpose of HB 1919 is determined by the language of the bill, and absent any legislative finding or direction, the rule should reflect the language of the statute.

Agency Response: The Department disagrees with the commenter and declines to make a change. Section 21.4401 does not state the purpose of HB 1919; it states the purpose of the Department's rules.

Comment: Two hundred and three commenters request that the adopted rule clarify that the Texas Health Risk Pool is required to provide autism coverage under HB 1919.

Agency Response: The Department cannot make the requested change because it would exceed the Department's rulemaking authority. Neither the Insurance Code Chapter 1506 (relating to the Texas Health Risk Pool) nor the Insurance Code Chapter 1355, Subchapter A, (relating to Group Benefit Health Plan Coverage for Certain Serious Mental Illnesses and Other Disorders) provide that the Texas Health Risk Pool is to provide coverage for autism spectrum disorder. Neither Chapter 1506 nor Chapter 1355 authorizes the Department to require coverage that is not authorized by statute. Rather, the Insurance Code §1506.151(a) provides that the Texas Health Risk Pool is required to offer "coverage consistent with major medical expense coverage to each eligible individual." Section 1506.151(b) provides that the specific coverages to be provided by the Texas Health Risk Pool are to be established by the Board of Directors of the Texas Health Risk Pool with the approval of the Commissioner. Therefore, in order for the Texas Health Risk Pool to be required to provide coverage for autism spectrum disorder, the Board of Directors of the Risk Pool would have to authorize such coverage, and such coverage would have to be approved by the Commissioner.

§21.4402(1). Definition of "applied behavior analysis"

Comment: One commenter objects to the definition of "applied behavior analysis" in proposed §21.4402(1) because, while it is an improvement over earlier drafts, it is still "vague to the point of providing no direction." A second commenter suggests revising the definition to include reference to empirical validation by adding the following: ". . .meaningful degree. This would include the collection and analysis of individual data collected on treatment progress."

Agency Response: The Department disagrees with the commenters and declines to make any change. The proposed definition for "applied behavior analysis," which is adopted without change, is based on the definition developed and used by TRICARE. Because TRICARE certified providers are expressly permitted to provide ASD services and treatment under the Insurance Code §1355.015, the Department believes that it is appropriate that this definition apply for all other statutorily recognized providers of ASD treatment as required under §1355.015 of the Insurance Code. Therefore, the Department does not agree that the definition is "vague to the point of providing no direction" or that the requested change to the proposed definition is necessary or appropriate.

Comment: A commenter suggests referencing "board certified" behavior analysis in proposed §21.4402(1), so that individuals with some other credential that would meet the state requirement but who do not have training in applied behavior analysis cannot practice or bill for it.

Agency Response: The Department disagrees with the comment and declines to make a change. The Department does not have the authority to regulate the practice of medicine. Additionally, the Insurance Code §1355.015(b) specifies the types of health care practitioners who meet the statutory requirements to provide ASD treatment under §1355.015 of the Insurance Code. The Department does not have the authority to prevent a health care practitioner who meets those qualifications from billing for the treatment the health care practitioner provides as long as the treatment is in accordance with §1355.015 and these rules.

§21.4402(4). Definition of "generally recognized services"

Comment: One commenter requests that the definition of "generally recognized services" in proposed §21.4402(4) be revised to track the statutory language in §1355.015(c) of the Insurance Code. The statutory language provides that "generally recognized services" "may include services such as. . ." and then specifies those services listed in §21.4402(4). Section 1355.015(c), however, does not include the language in §21.4402(4) "The term includes, but is not limited. . . ." The commenter also observes that the proposed definition of "generally recognized services" does not include a requirement that services prescribed be "medically necessary." The commenter asserts that with the exception of preventive care services, the commenter is not aware of any precedent that provides for coverage of medical care that does not have to meet a standard of medical necessity. According to the commenter, removing the ability of an insurer to establish that proposed care is appropriate removes any restriction on the reasonableness of care and can result in increased expenses. Additionally, it can also result in danger to consumers, as review of proposed care by a third party protects the consumer by comparing the proposed care to well established standards of care.

Agency Response: The Department disagrees with the commenter and declines to make a change. Pursuant to the Government Code §311.005(13), the term "includes" when used in a statute is a term of enlargement, not limitation, and use of the term does not create a presumption that components not expressed are excluded. Therefore, the provision in proposed §21.4402(4), stating that the term "generally recognized service. . . includes, but is not limited to, the following services. . . ." is consistent with the Government Code §311.005(13) rule of construction and is adopted without change. It is the Department's position that this statement is a necessary and accurate clarification of §1355.015(c) of the Insurance Code. With regard to the comment concerning the addition of an express requirement that generally recognized services must be "medically necessary," the Department disagrees that such a requirement should be included. The inclusion of such a requirement is not consistent with the Insurance Code §1355.015, which does not address medical necessity. The Insurance Code §1355.015 neither mandates that utilization review be conducted nor restricts a health benefit plan's ability to conduct utilization review. These rules are consistent with §1355.015.

§21.4402(5). Definition of "health care practitioner"

§21.4404(b). Coverage for applied behavior analysis

Comment: A commenter objects to the definition for "health care practitioner" in proposed §21.4402(5) because it appears to allow for any type of provider, qualified or not, to deliver services. The commenter points out that the Insurance Code already contains a definition of "health care practitioner" in §1451.001 of the Insurance Code. The commenter also objects to proposed §21.4404(b), which provides that a health plan may not deny coverage on the basis that a health care practitioner does not hold a license issued by an agency of this state because the Insurance Code contains a definition of health care practitioner in the Insurance Code §1451.001. The commenter again points out that §1451.001 provides a list of practitioners, and the commenter states that all of the listed practitioners are required to be licensed by a state board or agency.

Agency Response: The Department disagrees with the commenter and declines to make a change. The definition in the Insurance Code §1451.001 is applicable to the Insurance Code Chapter 1451, which regulates access to certain practitioners

and facilities. These rules implement the Insurance Code Chapter §1355.015, which regulates autism spectrum disorder coverage for certain children. The definition in proposed §21.4402(5) and the provision proposed in §21.4404(b), which are adopted without change, are based on provisions in the Insurance Code §1355.015(b) that specify the qualifications of a health care practitioner whose autism spectrum disorder treatment is covered under §1355.015.

§22.4402(7). Definition of "primary care physician"

Comment: One commenter references the words "develop a treatment plan for the purpose of treating autism spectrum disorder" in proposed §21.4402(7) and states that clarification is needed regarding what is to be involved in such a treatment plan. The commenter asserts that the final rule should indicate that any treatment plan developed by a primary care physician should be a very general treatment plan. According to the commenter, the final rule should not leave open the possibility of a physician dictating to other specially and appropriately trained professionals details of what to do and how to do it. Otherwise, the rule could result in physicians recommending or prescribing inappropriate interventions or inappropriately sequenced interventions as well as inappropriate therapeutic methods or time and resource wasting delays in development of appropriate treatment plans.

Agency Response: The Department disagrees with the commenter and declines to make a change. The treatment plan is part of the medical care provided by a doctor, and the Department does not have the authority to regulate or direct the care that a doctor provides. In regard to the commenter's concern that a physician might recommend or prescribe inappropriate care that results in a waste of time or resources, neither the Insurance Code §1355.015 nor these adopted rules prevent a health benefit plan from conducting utilization review. Through use of a utilization review program, health benefit plans can prevent the use of inappropriate or wasteful treatments.

Comment: A commenter requests that proposed §22.4402(7) be revised to read:" A physician selected or otherwise designated by the enrollee as the enrollee's primary care physician pursuant to the provisions of the enrollee's health benefit plan or, if the enrollee's health benefit plan does not contain provisions concerning selection or designation of a primary care physician, a physician selected or otherwise designated *by the enrollee* to develop a treatment plan for the purpose of treating autism spectrum disorder." The commenter notes that the proposed definition for "primary care physician" includes the words "selected or designated." According to the commenter, insurance companies, historically, have used "designated" primary care physicians combined with financial disincentive plans to ensure extremely low uptake of particular services which might otherwise be covered. The commenter also asserts that many primary care physicians have no more than a cursory knowledge of autism and that these physicians would prefer the enrollee switch to a primary care physician who has extensive experience with autism and autism treatment programs. The commenter states that if autism treatment program quality is to be kept high the person prescribing and managing it should be knowledgeable about the intricacies of quality treatment. According to the commenter, the proposed definition for "primary care physician" potentially allows health benefit plans the ability to select or designate an enrollee's primary care physician, even without specific plan authorization to do so.

Agency Response: The Department agrees in part with the commenter and has revised §22.4402(7) as adopted similarly to the change requested. The first instance in which the phrase "A physician selected or otherwise designated as the enrollee's primary care physician. . . ." is used references health benefit plans that contain provisions specifying how a primary care physician is to be selected or designated. Such health benefit plans might have instances in which the health benefit plan issuer is permitted to designate a primary care physician. It is not appropriate for the rule to exclude or negate such permitted instances. The second instance in which the phrase "a physician selected or otherwise designated as the enrollee's primary care physician. . . ." is used references health benefit plans that do not contain provisions specifying how a primary care physician is to be selected or designated. It is necessary to stipulate what a "primary care physician" is in regard to such health benefit plans; otherwise there would be no "primary care physician" to prescribe treatment. It is not the intent of these rules to authorize health benefit plans to designate an enrollee's primary care physician in the absence of a contract provision that gives the plan that authority. Therefore, it is appropriate and necessary to clarify that in those instances in which a health benefit plan does not contain provisions specifying how a primary care physician is to be selected or designated, it is the enrollee that has the ability to choose a primary care physician. However, because the enrollees subject to the Insurance Code §1355.015 are young children suffering from a condition that often limits one's ability to communicate, it is not feasible to make the change exactly as requested by the commenter. Therefore, the Department has revised the definition of "primary care physician" in §22.4402(7) as adopted to read: "A physician selected or otherwise designated as the enrollee's primary care physician pursuant to the provisions of the enrollee's health benefit plan or, if the enrollee's health benefit plan does not contain provisions concerning selection or designation of a primary care physician, a physician selected or otherwise designated by the enrollee or the enrollee's parent or guardian to develop a treatment plan for the purpose of treating autism spectrum disorder."

§21.4403(a)(1). Age range of covered enrollees

Comment: A commenter suggests that the lower limit of the age range for covered children in proposed §21.4403(a)(1) be set at two rather than three. The commenter offers the following reasons for the suggestion: (i) this would be in line with the legislative intent of HB 1919; (ii) such a provision would also facilitate very early intervention for children with ASD, which is important because scientific research has shown that intensive intervention for children two years of age results in a need for less intensive and expensive services in the future; and (iii) ensuring availability of another year of services for children between their second and third birthdays would be beneficial and consistent with best practice in the field of autism intervention.

Agency Response: The change requested by the commenter is unnecessary as a result of the revision made to adopted §21.4403(a)(1) in response to another comment. Section 21.4403(a)(1) as adopted reads: "At a minimum, a health benefit plan must provide coverage as provided by the Insurance Code §1355.015 to an enrollee described by the Insurance Code §1355.015(a)."

§21.4403(c). ASD coverage as a medical and surgical benefit

Comment: One commenter questions the authority of the Department to include in the rules proposed §21.4403(c), which provides that services provided for autism spectrum disorder

must be provided under the medical and surgical provisions of the benefit plan as a medical and surgical benefit. The commenter points out that HB 1919 amended Chapter 1355 of the Insurance Code which is entitled "Benefits For Certain Mental Disorders." According to the commenter, because coverage for mental disorders often have different terms of coverage than medical and surgical benefits, the proposed language appears to impose a higher standard than authorized by HB 1919.

Agency Response: The Department disagrees with the commenter and declines to make a change. The Department's reasons are the following. First, pursuant to Government Code §311.024, "The heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute." Therefore, the fact that the heading of the Insurance Code Chapter 1355 is "Benefits For Certain Mental Disorders" does not limit or prevent implementation of the autism spectrum disorder coverage mandate in a way that reflects the legislative intent of HB 1919. Second, documents in the legislative history of HB 1919, along with a reading of the changes made to the Insurance Code by HB 1919, indicates legislative intent to apply the autism spectrum disorder coverage mandate as a medical benefit. For example, SB 419, 80th Legislature, Regular Session, was a predecessor bill to HB 1919, and the author of SB 419 was also the author of the amendment that added the autism spectrum disorder coverage mandate to HB 1919. The bill analysis for the Introduced version of SB 419 states that "Insurers deny treatment coverage for children with ASD by classifying ASD as a mental illness, although autism is recognized as a neurobiological disorder in the [DSM-IV] of the American Psychiatric Association." This statement indicates intent by the author of SB 419 for autism spectrum disorder to be classified as something other than a mental illness. Third, the author's intent is also reflected in the changes made by HB 1919 to the Insurance Code. For example, the heading for the Insurance Code Chapter 1355, Subchapter A was changed from "Group Health Benefit Plan Coverage for Certain Serious Mental Illnesses" to "Group Health Benefit Plan Coverage for Certain Serious Mental Illnesses and Other Disorders." (Emphasis added.) While the addition of the reference to "Other Disorders" in the Subchapter A heading cannot be argued to expand the meaning of the statute pursuant to the Government §311.024, it arguably provides insight into the author's intent in amending the subchapter. Fourth, a definition for "autism spectrum disorder" was added to the Insurance Code §1355.001 that defines the condition as a "neurobiological disorder." Also, a definition for "neurobiological disorder" was added to the Insurance Code §1355.001 which provides that a neurobiological disorder is an illness of the nervous system, and the term "pervasive developmental disorder," which is a form of autism spectrum disorder, was removed from the definition of "serious mental illness" and incorporated into the definition of "autism spectrum disorder."

§21.4402(5). Definition of "health care practitioner"

§21.4404(a). Requirements for health care practitioner who provides treatment

§21.4404(b). Coverage for applied behavior analysis

Comment: Numerous commenters suggest that the proposed rules directly recognize and address practitioners that have credentials issued by the Behavior Analyst Certification Board.

Two hundred and two commenters request that the definition of "health care practitioner" in §21.4402(5) ensure that health benefit plans clearly understand that Board Certified Behavior Analysts are covered health care practitioners. Fourteen other commenters suggest explicitly listing Board Certified Behavior Analysts as a type of health care practitioner in proposed §21.4402(5). According to the commenters, Board Certified Behavior Analysts are eligible practitioners by virtue of the fact that they are eligible to provide these services under TRICARE, which makes them eligible as health care practitioners as provided by §21.4404(a)(3). Another commenter requests that the following sentence be added to proposed §21.4402(5): "Board Certified Behavior Analysts (BCBAs) are health care practitioners as it relates to §1355.015(b), and as such, treatment programs supervised by BCBA certified individuals will be covered when prescribed in accordance with 1355.015(b)." According to the commenter, this is needed to send a clear message to insurance companies that Board Certified Behavior Analysts are covered practitioners. The commenter asserts that the legislative intent of HB 1919 is to enable children with ASD to access high quality intensive intervention and that programs supervised by Board Certified Behavior Analysts are clearly part of that intent. According to the commenter, the Board Certified Behavior Analysts certifications are consistent with the associated requirements for becoming a provider under §1355.015(b) of the Insurance Code. The commenter asserts additional reasons for the requested language: (i) the Board Certified Behavior Analyst credential is certified through the national Behavior Analyst Certification Board and is recognized by the National Council for Certifying Agencies; (ii) the following professional organizations endorse the credential: the Association of Professional Behavior Analysts, the Association for Behavior Analysis International, and Division 25 (Behavior Analysis) of the American Psychological Association; (iii) the Defense Department has recognized the credential under its TRICARE health plan; (iv) the U.S. Centers for Disease Control refers patients to the Association for Behavior Analysis International; and (v) at the state level, the Texas Home Living Medicaid Waiver and the Home and Community Services Waiver have certified Board Certified Behavior Analysts as approved service providers for applied behavior analysis.

One commenter suggests that proposed §21.4404(a)(3) be revised to clearly spell out that Board Certified Behavior Analysts are eligible practitioners under the rule, rather than just providing that a practitioner certified as a provider under TRICARE is an eligible practitioner. The commenter asserts the following reasons for the suggested revision: (i) the third option in the Insurance Code §1355.015(b), requiring that a provider providing treatment under the Insurance Code §1355.015, be certified as a provider under TRICARE military health system was inserted in HB 1919 to enable reimbursement for Board Certified Behavior Analysts, who are certified by the Board Certified Behavior Analysts; (ii) Board Certified Behavior Analysts do not meet the second or third qualification in §1355.015(b) because there is not a state or federal licensure or certification, but the Board Certified Behavior Analyst credential is recognized under TRICARE, and thus the Board Certified Behavior Analyst credential must be recognized in this rule and its implementation; and (iii) Board Certified Behavior Analysts do not have to be individually credentialed by TRICARE, but are certified as eligible merely by their inclusion on the certificate registry maintained by the Behavior Analyst Certification Board.

One commenter requests that the rule be more direct in stating that §21.4404(b) applies to Board Certified Behavior Analysts. The commenter objects to proposed §21.4404(b), which relates to coverage for applied behavior analysis, because it raises con-

cerns that anyone can provide services under the rule. According to the commenter, these fears will be allayed if §21.4404(b) is more direct in stating that the rule applies to Board Certified Behavior Analysts. Another commenter opines that proposed §21.4404(b) regarding which health care practitioners are included in coverage for applied behavior analysis is circuitous, and that the clear intent of the statute is that insurance cover applied behavior analysis services provided by any person who is a Board Certified Behavior Analyst. Fourteen commenters assert that proposed §21.4404(b) should explicitly state that an insurer "shall provide coverage for services for autism spectrum disorder by a practitioner with the Board Certified Behavior Analyst credential issued by the Behavior Analyst Certification Board."

Agency Response: The Department disagrees with the commenters and declines to make the requested changes because the requested changes are not in compliance with the Insurance Code §1355.015(b). Therefore, §21.4402(5) and §21.4404(a) and (b) are adopted without changes to the proposed text. For the following reasons, the Department does not have the authority under the Insurance Code Chapter 1355 to explicitly list Board Certified Behaviors Analysts as a type of health care practitioner in the definitions section of the rules or to require that treatment provided by individuals certified by the Behavior Analyst Certification Board is to automatically be covered as a benefit under the ASD coverage mandate in the Insurance Code Chapter 1355, Subchapter A.

First, the Behavior Analyst Certification Board is a non-governmental professional association, and the Department is not authorized under the Insurance Code Chapter 1355 to recognize or specify that providers certified by non-governmental professional associations are qualified to provide treatment under the Insurance Code §1355.015.

Second, the Insurance Code §1355.015(b)(1) - (3) specifies that a health care practitioner must be "licensed, certified, or registered by an appropriate agency of this state," must have a professional credential "recognized and accepted by an appropriate agency of the United States," or must be "certified as a provider under the TRICARE military health system" to provide services under §1355.015(b), and the paragraphs in proposed §21.4404(a) simply reiterate §1355.015(b)(1) - (3), and proposed §21.4404(b) clearly references the health care practitioner requirements in the Insurance Code §1355.015(b)(1) - (3). The authority of a person holding a certification issued by the Behavior Analyst Certification Board to provide services under the Insurance Code §1355.015(b)(2) hinges on recognition and acceptance of the professional credential issued by the Behavior Analyst Certification Board by an appropriate agency of the United States. Currently TRICARE, a healthcare delivery system that is a part of the Department of Defense, does recognize and accept the certifications issued by the Behavior Analyst Certification Board. Therefore, practitioners holding certifications issued by the Behavior Analyst Certification Board are qualified to provide services under the Insurance Code §1355.015 pursuant to the Insurance Code §1355.015(b)(2). However, the fact that TRICARE currently recognizes and accepts the certifications issued by the Behavior Analyst Certification Board does not mean that TRICARE will accept such certifications in the future. According to Chapter 11, Section 3.2 of the TRICARE Policy Manual 6010.54-M, August 1, 2002, certified membership in a national or professional association that sets standards for the profession is accepted in place of state licensure or certification in instances when the state where a provider practices does not offer licensure or certification. Chapter 11, Section 3.2 of the TRICARE Policy Manual also provides that when a new state law is enacted that requires or provides for licensing or certification of a provider, authorized providers must obtain the license as soon as the state begins issuance. This means that if Texas begins to license or certify applied behavior analysis providers, TRICARE will no longer recognize and accept the certifications issued by the Behavior Analyst Certification Board within this state. While other federal agencies may also recognize and accept the certifications issued by the Behavior Analyst Certification Board, the Department is not aware of any such federal agencies. One commenter references recognition by the "National Council for Certifying Agencies." There does not appear to be such an agency. A "National Commission for Certifying Agencies" exists, but it is not a federal agency. The commenter also states that the U.S. Centers for Disease Control refers patients to the Association for Behavior Analysis International. However, "referral" does not correlate to "recognition and acceptance." Additionally, the Association for Behavior Analysis International does not issue certifications on behalf of the Behavior Analyst Certification Board. Finally, the same commenter lists various professional organizations and state agencies that it asserts recognizes and accepts the Board Certified Behavior Analyst credential. Recognition and acceptance by a professional organization or a state agency, however, is not sufficient for compliance with the Insurance Code §1355.015(b)(2). The authority of a person holding a certification issued by the Behavior Analyst Certification Board to provide covered services under the Insurance Code §1355.015(b)(3) hinges on certification by TRICARE. While one of the requirements for certification as an applied behavior analysis provider under the TRICARE military health system is that the provider be certified by the Behavior Analyst Certification Board, the TRICARE military health system also requires that an applied behavior analysis provider meet "all best standards of the medical community" and be "verified as having met those standards by one of the TRICARE regional contractors."

During this rulemaking process, numerous stakeholders have asserted that TRICARE does not require certification of applied behavior analysis providers, and have expressed confusion over the reference to TRICARE certification in the statute and the rule drafts. Therefore, the following summarizes the TRICARE certification process that is currently required for a practitioner to be authorized to provide applied behavior analysis treatment services pursuant to the Insurance Code §1355.015(b)(3). Chapter 20, Section 10 of the TRICARE Operations Manual, 6010.51-M, August 1, 2002, identifies three types of applied behavior analysis providers that can become certified: Autism Demonstration Corporate Services Providers (ACSPs), EIA Supervisors, and EIA Tutors (EIA is an acronym for "Educational Interventions for Autism spectrum disorder"). Pursuant to the TRICARE Operations Manual, ACSPs must meet the following requirements: (i) submit evidence of professional liability insurance; (ii) submit all documentation necessary to support an application for designation as a TRICARE ACSP; (iii) enter into a TRICARE participation agreement; (iv) employee directly or contract with EIA Supervisors and EIA Tutors; (v) certify that all EIA Supervisors and EIA Tutors employed by or contracted with the ACSP meet the education, training, experience, competency, supervision, and demonstration requirements specified by the TRICARE Operations Manual; (vi) comply with all applicable organizational and individual licensing or certification requirements in the state, county, municipality, or other political subdivision in which services are provided; and (vii) comply with all other requirements applicable to TRICARE-authorized providers. Additionally, an

ACSP who is an individual must undergo a criminal history review by the TRICARE regional contractor. Pursuant to the TRICARE Operations Manual, an EIA Supervisor must have: (i) a current, unrestricted state-issued license to provide applied behavior analysis services; (ii) a current, unrestricted state-issued certificate as a provider of applied behavior analysis services; or (iii) be certified by the Behavior Analyst Certification Board as either a Board Certified Behavior Analyst or a Board Certified Assistant Behavior Analyst where state issued licenses or certificates are not available. Additionally, an EIA Supervisor must meet the following requirements: (i) enter into a TRICARE participation agreement; (ii) employee directly or contract with EIA Tutors; (iii) report sanctions by the Behavior Analyst Certification Board or loss of Behavior Analyst Certification Board certification to TRICARE's regional contractor within 30 days; (iv) ensure that the quality of services provided by EIA Tutors meets the current Behavior Analyst Certification Board evidence-based standards; (v) maintain all applicable business licenses and employment or contractual documentation in accordance with federal, state, and local requirements; (vi) meet all applicable requirements of the state in which services are provided; (vii) cooperate fully with TRICARE's designated utilization and clinical quality management organization; and (viii) comply with all other requirements applicable to TRICARE-authorized providers. Pursuant to the TRICARE Operations Manual, an EIA Tutor must have completed 40 hours of classroom training in applied behavior analysis techniques in accordance with BACB guidelines prior to providing services. Additionally, an EIA Tutor must have: (i) completed a minimum of 12 semester hours of college coursework in psychology, education, social work, behavioral sciences, human development, or related fields and be currently enrolled in a course of study leading to an associate's or bachelor's degree by an accredited college or university; (ii) completed a minimum of 48 semester hours of college courses in an accredited college or university; or (iii) have a High School diploma or GED equivalent and have completed 500 hours of employment providing ABA services as verified by the ACSP. Finally, an EIA Tutor must receive no less than two hours supervision per month from the EIA Supervisor, in accordance with BACB guidelines.

§21.4404(a). Requirements for health care practitioner who provides treatment

Comment: One commenter questions whether the term "appropriate" in proposed §21.4404(a)(1) and (2) means that there is some type of standard a provider must meet in order to provide services. Proposed §21.4404(a)(1) and (2) read: "a health care practitioner. . . must. . . be licensed, certified, or registered by an appropriate agency of this state. . . [or] have professional credentials that are recognized by and accepted by an appropriate agency of the United States." According to the commenter, inclusion of the term "appropriate" in both of these paragraphs suggests that some level of expertise should be required under each paragraph. As an example, the commenter asserts that there are no inappropriate agencies of the United States.

Agency Response: The standards a health care practitioner must meet under the Insurance Code §1355.015 and §21.4404(a)(1) - (3) are those standards (i) that are required to become licensed, certified or registered by an appropriate agency of this state; (ii) that are necessary to obtain professional credentials that are recognized and accepted by an appropriate agency of the United States; or (iii) that are required to become certified as a provider under the TRICARE military health system. The specific standards a health care practitioner must meet depend on the services that the health care practitioner provides. For example, in order for an individual to be qualified to provide speech therapy services pursuant to §21.4404(a)(1), the individual must be licensed as a speech-language pathologist by the Texas State Board of Examiners for Speech-Language Pathology and Audiology, the appropriate state agency to license a provider of speech therapy services. If the individual providing the speech therapy services only has a license for accounting issued by the Texas State Board of Public Accountancy, the provider of the speech therapy services would be licensed by an inappropriate state agency and would not be qualified to provide speech therapy services pursuant to §21.4404(a).

Comment: A commenter suggests that §21.4404(a)(1) and (2) be revised to provide that only those with a minimum of a Master level license in the Human Developmental Field (Social Worker, Marriage and Family Therapists, Licensed Professional Counselors, Psychologists) be permitted to treat autism. The commenter expresses concern that under proposed §21.4404(a)(1) and (2) "just about anyone with minimum education and credentials approved by an appropriate agency" may treat a disorder as complex as autism. The commenter asserts that there is no reference to type of education, such as GED or credentials that could be obtained through a weekend workshop, and asks which agencies are appropriate and who determines them. The commenter expresses concern that this is a way for insurance companies to cut costs, and enrollees will suffer inadequate care from lack of knowledge of the behavioral health care provider.

Agency Response: The Department disagrees with the commenter and declines to make a change. The Insurance Code §1355.015(d) specifies the requirements for a health care practitioner who may provide covered treatment under §1355.015. There is no statutory requirement for any of the minimum Master degree levels requested by the commenter. Additionally, the minimum Master degree levels cited by the commenter would not necessarily ensure appropriate providers to deliver all of the treatments authorized in the Insurance Code §1355.015(c). For example, such licensed providers could not necessarily provide generally recognized services such as speech therapy or medications or nutritional supplements.

Comment: A commenter objects to proposed §21.4404(a) because it permits unlicensed providers to provide care for autism. According to the commenter, only licensed mental health providers should treat autistic individuals. The commenter asserts the following reasons: (i) licensure exists to protect the public, and qualifications for licensure ensure that one has met stringent requirements for training at accredited universities and provides the public with the assurance that the state of Texas is vetting all providers of mental health services; (ii) children are an especially vulnerable population and children with autism even more so as many are not capable of communicating with parents or care givers should any abuse occur; and (iii) there is particular concern about pedophiles having access to children suffering from autism; and while licensure does not provide a 100 percent guarantee of protection, individuals convicted of a felony cannot hold a license to practice.

Agency Response: The Department disagrees with the commenter and declines to make a change because required licensure for all health care practitioners providing treatment under the Insurance Code §§1355.015 would not be in compliance with the statute. Under proposed §21.4404(a), which is derived directly from the Insurance Code §1355.015(b), practitioners do not have to be licensed to provide treatment for autism spectrum

disorder under the Insurance Code Chapter 1355, Subchapter A, if the practitioner either has a "professional credential [that] is recognized and accepted by an appropriate agency of the United States" or is "certified as a provider under the TRICARE military health system."

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: None.

For, with changes: Texana, Texas Association of Health Plans, Shorkey Center, Behavioral Innovations, Families for Effective Autism Treatment, Texas Autism Advocacy, and 218 individuals.

Against: One individual.

SUBCHAPTER AA. CONSUMER CHOICE HEALTH BENEFIT PLANS

DIVISION 1. GENERAL PROVISIONS

28 TAC §21.3502

STATUTORY AUTHORITY. The amendments and new sections are adopted pursuant to the Insurance Code §§1355.015, 1507.009, 1507.059, and 36.001. Section 1355.015 establishes the requirement that health benefit plans provide autism spectrum disorder coverage for certain children. Section 1507.009 provides that the Commissioner shall adopt rules as necessary to implement Chapter 1507, Subchapter A, related to Consumer Choice of Benefits Health Insurance Plans. Section 1507.059 provides that the Commissioner shall adopt rules as necessary to implement Chapter 1507, Subchapter B, related to Consumer Choice of Benefits Health Maintenance Organization Plans. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 2. STATE-MANDATED HEALTH BENEFITS

28 TAC §§21.3510 - 21.3513, 21.3515 - 21.3518

STATUTORY AUTHORITY. The amendments and new sections are adopted pursuant to the Insurance Code §§1355.015, 1507.009, 1507.059, and 36.001. Section 1355.015 establishes the requirement that health benefit plans provide autism spectrum disorder coverage for certain children. Section 1507.009 provides that the Commissioner shall adopt rules as necessary to implement Chapter 1507, Subchapter A, related to Consumer Choice of Benefits Health Insurance Plans. Section 1507.059 provides that the Commissioner shall adopt rules as necessary to implement Chapter 1507, Subchapter B, related to Consumer Choice of Benefits Health Maintenance Organization Plans. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 4. ADDITIONAL REQUIREMENTS

28 TAC §21.3540, §21.3543

STATUTORY AUTHORITY. The amendments and new sections are adopted pursuant to the Insurance Code §§1355.015, 1507.009, 1507.059, and 36.001. Section 1355.015 establishes the requirement that health benefit plans provide autism spectrum disorder coverage for certain children. Section 1507.009 provides that the Commissioner shall adopt rules as necessary to implement Chapter 1507, Subchapter A, related to Consumer Choice of Benefits Health Insurance Plans. Section 1507.059 provides that the Commissioner shall adopt rules as necessary to implement Chapter 1507, Subchapter B, related to Consumer Choice of Benefits Health Maintenance Organization Plans. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

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SUBCHAPTER JJ. AUTISM SPECTRUM DISORDER COVERAGE

DIVISION 1. GENERAL PROVISIONS

28 TAC §§21.4401 - 21.4404

STATUTORY AUTHORITY. The amendments and new sections are adopted pursuant to the Insurance Code §§1355.015, 1507.009, 1507.059, and 36.001. Section 1355.015 establishes the requirement that health benefit plans provide autism spectrum disorder coverage for certain children. Section 1507.009 provides that the Commissioner shall adopt rules as necessary to implement Chapter 1507, Subchapter A, related to Consumer Choice of Benefits Health Insurance Plans. Section 1507.059 provides that the Commissioner shall adopt rules as necessary to implement Chapter 1507, Subchapter B, related to Consumer Choice of Benefits Health Maintenance Organization Plans. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§21.4402. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Applied behavior analysis--The design, implementation, and evaluation of systematic environmental changes to produce socially significant change in human behavior through skill acquisition and the reduction of problematic behavior. Applied behavior analysis includes direct observation and measurement of behavior and the identification of functional relations between behavior and the environment. Contextual factors, establishing operations, antecedent stimuli, positive reinforcers, and other consequences are used to produce the desired behavior change.

(2) Autism spectrum disorder--As defined in the Insurance Code §1355.001(3).

(3) Enrollee--A person covered by a health benefit plan described by the Insurance Code §1355.002.

(4) Generally recognized services--The term includes, but is not limited to, the following services, when such services are prescribed in accordance with the Insurance Code §1355.015(b) and §21.4403(b) of this subchapter (relating to Required Coverage):

(A) evaluation and assessment services;

(B) applied behavior analysis;

(C) behavior training and behavior management;

(D) speech therapy;

(E) occupational therapy;

(F) physical therapy; or

(G) medications or nutritional supplements used to address symptoms of autism spectrum disorder.

(5) Health care practitioner--A physician, advance practice nurse, physician assistant, or other individual appropriately licensed, registered, or certified, or whose professional credential is recognized and accepted as described by the Insurance Code §1355.015(b).

(6) Neurobiological disorder--As defined in the Insurance Code §1355.001(4).

(7) Primary care physician--A physician selected or otherwise designated as the enrollee's primary care physician pursuant to the provisions of the enrollee's health benefit plan or, if the enrollee's health benefit plan does not contain provisions concerning selection or designation of a primary care physician, a physician selected or otherwise designated by the enrollee or the enrollee's parent or guardian to develop a treatment plan for the purpose of treating autism spectrum disorder.

§21.4403. Required Coverage.

(a) Certain Children Enrollees.

(1) At a minimum, a health benefit plan must provide coverage as provided by the Insurance Code §1355.015 to an enrollee described by the Insurance Code §1355.015(a).

(2) Pursuant to the Insurance Code §1355.015(a), the health benefit plan is not precluded from providing coverage of treatment and services described by §1355.015(b) of the Insurance Code because an enrollee who is being treated for autism spectrum disorder becomes older than the age range specified by §1355.015(a).

(b) Enrollees of Other Ages. A health benefit plan is not precluded from providing coverage of treatment and services described by §1355.015(b) of the Insurance Code for enrollees of other ages.

(c) Medical and Surgical Benefit. In accordance with the Insurance Code §1355.002 and §1355.015(b), a health benefit plan issuer must provide coverage as a medical and surgical benefit under the health benefit plan for all generally recognized services prescribed in relation to autism spectrum disorder by the enrollee's primary care physician in the treatment plan recommended by that physician.

(d) Deductibles, Copayments, and Coinsurance. Pursuant to the Insurance Code §1355.015(d), coverage under this section may be subject to annual deductibles, copayments, and coinsurance that are consistent with annual deductibles, copayments, and coinsurance required for other coverage under the health benefit plan.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 26. SMALL EMPLOYER HEALTH INSURANCE REGULATIONS
SUBCHAPTER D. HEALTH GROUP COOPERATIVES

28 TAC §26.409

The Commissioner of Insurance adopts an amendment to §26.409, concerning the exclusion of state-mandated health benefits for autism spectrum disorder coverage in health benefit plans issued through health group cooperatives. The amendment is adopted without changes to the proposed text published in the April 3, 2009, issue of the *Texas Register* (34 TexReg 2229).

REASONED JUSTIFICATION. House Bill (HB) 1919, 80th Legislature, Regular Session, effective January 1, 2008, amends Chapter 1355 of the Insurance Code to include, as a state mandated benefit, all generally recognized services prescribed in relation to autism spectrum disorder by an insured's primary care physician in the treatment plan recommended by that physician. However, pursuant to the Insurance Code §1501.0581(i), a health benefit plan issued by a health benefit plan issuer to provide coverage with a health group cooperative is not subject to a state law, including a rule, that relates to a particular illness, disease, or treatment. Pursuant to the Insurance Code §1355.001(3), which defines "autism spectrum disorder" as a neurobiological disorder, and the Insurance Code §1355.001(4), which defines a "neurobiological disorder" as an illness of the nervous system, autism spectrum disorder is a particular illness. Therefore, the mandated autism spectrum disorder coverage requirements enacted by HB 1919 are not applicable to health benefit plans that provide coverage with a health group cooperative pursuant to §1501.0581 of the Insurance Code. Chapter 26, Subchapter D, of Title 28 of the Texas Administrative Code regulates health benefit plans issued by health carriers through health group cooperatives. Section 26.409 specifies the state mandates that are not required to be provided by such plans. The amendment is necessary to update existing §26.409(a) to specify that the state-mandated health benefit of coverage of autism spectrum disorder as required by the Insurance Code Chapter 1355, Subchapter A, is not required in a health benefit plan issued by a health carrier through a health group cooperative.

HOW THE SECTION WILL FUNCTION. The adopted amendment, which is consistent with the Insurance Code §1501.0581(i), provides that the state-mandated coverage for autism spectrum disorder, as required by the Insurance Code Chapter 1355, Subchapter A, is not required to be included in a health benefit plan issued by a health carrier through a health group cooperative.

SUMMARY OF COMMENTS AND AGENCY RESPONSE. The Department did not receive any comments on the published proposal.

STATUTORY AUTHORITY. The amendment is adopted pursuant to the Insurance Code §§1355.015, 1355.001(3) and (4), 1501.0581(i) and 36.001. Section 1355.015 requires that health benefit plans provide autism spectrum disorder coverage for certain children. Pursuant to the Insurance Code §1355.001(3), which defines "autism spectrum disorder" as a neurobiological disorder, and the Insurance Code §1355.001(4), which defines a "neurobiological disorder" as an illness of the nervous system, autism spectrum disorder is a particular illness. Section 1501.0581(i) provides that except as provided by §1501.0581(n), which concerns coverage for diabetes equipment, supplies, and services, a health benefit plan issued by a health benefit plan issuer to provide coverage with a health group cooperative is not subject to a state law, including a rule, that relates to a particular illness, disease, or treatment. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 65. WILDLIFE

SUBCHAPTER A. STATEWIDE HUNTING AND FISHING PROCLAMATION

DIVISION 1. GENERAL PROVISIONS

31 TAC §65.11

The Texas Parks and Wildlife Commission adopts an amendment to §65.11, concerning Lawful Means, with changes to the proposed text as published in the June 19, 2009, issue of the *Texas Register* (34 TexReg 4078).

The change reorganizes and adds clarifying language to paragraphs (2) and (3). In part, the intent of the rule as proposed was to allow the use of crossbows to take deer during the archery-only open season in all counties except Grayson County and to create an exception for Grayson County. The proposed rule was made necessary by the passage of House Bill (H.B.) 968 by the 81st Texas Legislature, Regular Session. An inadvertent consequence of the department's interpretation of H.B. 968, reflected in the rule as proposed, was that crossbows would have been lawful in Grayson County only when used by person with an upper-limb disability, irrespective of season. The department has since determined that the effect of H.B. 968 is to authorize the commission to allow the use of crossbows during archery-only open seasons, but not to require that crossbow use be restricted to persons with an upper-limb disability in counties where archery equipment is the only lawful method.

The change also alters paragraph (6)(B)(i)(I) for purposes of clarification. As proposed, paragraph (6)(B)(i)(I) stipulated that a person using a laser sighting device because of a disability that prevents the person from using traditional sighting devices must be assisted by another person, provided the person is not a disabled person or legally blind. The department did not intend for the provision to mean that disabled persons in general cannot assist, only that assistance cannot be provided by another person who has a disability that prevents the use of traditional sighting devices.

H.B. 968 states that "In a county that does not permit hunting with a firearm, a hunter may use a crossbow only if the hunter is a person with upper limb disabilities and has an archery hunting stamp." The department interpreted this statement to apply to counties where any hunting is restricted to archery only, but

has since concluded that the statement applies only to counties where all hunting is restricted to archery equipment. In Grayson County, deer hunting is restricted to archery equipment, but turkey, for instance, may be taken by firearm.

Therefore, the rule as adopted has been changed to maintain status quo in Grayson County with respect to crossbow use (i.e., crossbows can be used to take deer during the archery season only by persons with a documented upper-limb disability, but could be used by anyone, regardless of physical ability, during the general season).

The amendment allows the use of crossbows by all persons during the archery-only season, with an exception related to one county, and allows the use of laser sighting devices by any person with a physical disability that renders the person incapable of using a traditional firearm sighting device, provided the person possesses a physician's or optometrist's statement certifying the extent of the disability.

Under Government Code, §2001.006(b), an agency may adopt a rule in preparation for the implementation of legislation that has become law but has not taken effect. With the passage of H.B. 968 and H.B. 1805 by the 81st Texas Legislature, Regular Session, it is necessary for the department to promulgate rules to implement the provisions of the bills.

Under Parks and Wildlife Code, §43.201(a), no person may hunt deer, turkey, or javelina during an open archery season restricted to longbows, recurved bows, compound bows, or crossbows used by hunters with upper limb disabilities unless the person has acquired an archery hunting stamp. H.B. 968 removes the reference to upper-limb disabilities in connection with the use of crossbows, and makes this applicable in all counties except those in which firearms are not lawful means for hunting. The amendment allows any person, regardless of physical ability, to use a crossbow during the archery-only season, provided the person has acquired an archery stamp, except in counties where hunting by firearms is prohibited.

Under current §65.11, a person may hunt during an archery-only season only by means of "lawful archery equipment," which is defined by §65.3, concerning Definitions, as "longbow, compound bow or recurved bow." However, there is an exception for crossbow use by persons with an upper-limb disability. The proposed amendment would alter the definition of "lawful archery equipment" to include crossbows and eliminate the upper-limb disability requirement. This change, in concert with the provisions of H.B. 968, would provide for the use of crossbows by any person during the archery season in all counties except Grayson County, where the use of crossbows during the archery-only season will be restricted to persons with a documented upper-limb disability.

Current §65.11 also allows a person who is legally blind to use a laser sighting device to hunt game animals and game birds during lawful hunting hours in open seasons, provided the person is assisted by a person who is not legally blind, has a hunting license; and is at least 13 years of age. H.B. 1805 provides for the use of laser sighting devices by persons with a physical disability (defined as "a documented permanent physical disability that renders the person incapable of using a traditional firearm sighting device") to hunt game animals and game birds during lawful hunting hours in open seasons, provided the person possesses a physician's or optometrist's statement certifying the extent of the disability, and is assisted by a person who does not have a physical disability, has a hunting license, and is at least 13 years of age.

The proposed amendment would alter the current rule to incorporate the provisions of H.B. 1805.

The proposed amendment will function by allowing the use of crossbows during the archery-only season in all counties except Grayson County, where only persons with an upper-limb disability may use crossbows during the archery-only season, and by allowing the use of laser sighting devices by disabled hunters who are incapable of using traditional sighting devices provided the person is assisted by a person who is not legally blind and is at least 13 years of age.

The department received 144 comments opposing adoption of the portion of the proposed rule that allows crossbows to be used by any person during the archery-only open season. Those comments, accompanied by the department's response to each, follow.

Seventy-one commenters opposing adoption stated that crossbows are not genuine archery equipment, that allowing crossbows to be used by anyone during archery-only seasons is an insult to archers and archery, and that archers pay for a stamp in order to have a season devoted exclusively to archery. The department disagrees with the comments and responds that the amendment does not eliminate the archery-only season, but merely adds crossbows as lawful archery equipment that may be used during an archery-only season. The department also responds that one person's choice to hunt with a crossbow during an archery-only season does not affect the hunting experience of another person who chooses to use some other type of archery equipment during the same season. No changes were made as a result of the comments.

Thirty commenters opposing adoption stated that only disabled hunters should be allowed to use crossbows during the archery-only season. The department disagrees with the comments and responds that the legislature has removed the upper-limb disability requirement. The department has determined that allowing the use of crossbows during the archery-only season does not infringe upon or reduce the opportunity of hunters who choose to use other forms of archery equipment during that time period. No changes were made as a result of the comments.

Seven commenters opposing adoption stated that allowing the use of crossbows during the archery-only season is inhumane and will result in increased wounding loss. The department disagrees with the comments and responds that like any other lawful means, archery equipment, including crossbows, are efficient and humane means for killing wildlife, but must be employed in a prudent manner to produce desired results. No changes were made as a result of the comments.

Six commenters opposing adoption stated that crossbows should not be lawful at any time. The department disagrees with the comments and responds that crossbows are an efficient and effective means for killing wildlife and are authorized by statute. No changes were made as a result of the comments.

Four commenters opposing adoption stated that crossbows should be lawful only during the general season. The department disagrees with the comments and responds that now that the statutory requirement restricting crossbow use during archery seasons to persons with an upper-limb disability has been removed, there is no reason not to provide additional opportunity for persons interested in using crossbow during the

archery-only season. No changes were made as a result of the comments.

Six commenters opposing adoption stated that crossbows should only be allowed to be used by disabled persons, and only during the archery-only season. The department disagrees with the comments and responds that now that the statutory requirement restricting crossbow use during archery seasons has been removed, there is no reason not to provide additional opportunity for persons interested in using crossbow during the archery-only season. No changes were made as a result of the comments.

Three commenters opposing adoption stated that the rule was an attempt by the department to raise additional revenue. The department disagrees with the comment and responds that the intent of the rule as adopted in to provide additional opportunity for persons to participate in archery-only seasons. No changes were made as a result of the comments.

Four commenters opposing adoption stated that allowing anyone to use crossbows during the archery-only season will result in increased poaching. The department disagrees with the comments and responds that it is not aware of any data showing a correlation between unlawful activities and the use of crossbows as opposed to other types of archery equipment. No changes were made as a result of the comments.

Eight commenters opposing adoption stated that there should be no exceptions to the statewide applicability of the rule. The department disagrees with the comments and responds that Grayson County is unique among the counties with an open deer season in that means and methods during the general season are restricted to archery equipment. The exception for Grayson County in the rule as adopted is to maintain the status quo. No changes were made as a result of the comments.

Nine commenters opposing adoption stated that allowing the use of crossbows by anyone during the archery-only season would present safety risks. The department disagrees with the comments and responds that crossbows are no more dangerous than other types of archery equipment. No changes were made as a result of the comments.

The department received four comments opposing adoption of the portion of the proposed rule that allows disabled persons to use laser sighting devices. Those comments, accompanied by the department's response to each, follow.

Two commenters opposing adoption stated that blind people should not be hunting. The department disagrees with the comments and responds that the purpose of the proposed amendment is to enable persons who are visually impaired to participate in hunting, as authorized by statute. No changes were made as a result of the comments.

Two commenters opposing adoption stated that laser sighting devices should not be lawful. The department disagrees with the comment and responds that under Parks and Wildlife Code, §62.0055, a legally blind person is entitled to use a laser sighting device, and that provision cannot be altered or eliminated by the commission. No changes were made as a result of the comments.

No groups or associations commented in favor of or opposition to adoption of the proposed rule.

The amendment is adopted under Parks and Wildlife Code, §61.054, which requires the commission to specify the means or method that may be used to hunt, take, or possess game animals, game birds, or aquatic animal life.

§65.11. Lawful Means.

It is unlawful to hunt any of the wildlife resources of this state except by the means authorized by this section and as provided in §65.19 of this title (relating to Hunting Deer with Dogs).

(1) Firearms.

(A) It is lawful to hunt alligators, game animals, and game birds with any legal firearm, including muzzleloading weapons, except as specifically restricted in this section.

(B) Special muzzleloader-only deer seasons are restricted to muzzleloading firearms only.

(C) It is unlawful to use rimfire ammunition to hunt alligator, deer, antelope, or desert bighorn sheep.

(D) It is unlawful to hunt alligators, game animals or game birds with a fully automatic firearm or any firearm equipped with a silencer or sound-suppressing device.

(E) In Angelina, Brazoria, Calhoun, Chambers, Galveston, Hardin, Jackson, Jasper, Jefferson, Liberty, Matagorda, Nacogdoches, Newton, Orange, Polk, Refugio, Sabine, San Augustine, San Jacinto, Trinity, Tyler and Victoria counties, alligators may not be hunted by means of firearms. In all other counties, alligators may by hunted by means of firearms on private property, including private waters, but may not be hunted by means of firearms from, on, in, across, or over public water.

(F) Alligators lawfully caught on a taking device may be dispatched by means of firearms in all counties.

(2) Archery.

(A) Except as provided in paragraph (3) of this section, a person may hunt by means of lawful archery equipment or crossbow during any open season; however, no person shall hunt deer by lawful archery equipment or crossbow during a special muzzleloader-only deer season.

(B) Arrows that are treated with poisons or drugs, or that contain explosives are not lawful devices for hunting any species of wildlife resource in this state.

(C) While hunting turkey and all game animals other than squirrels by means of longbow, compound bow, or recurved bow the arrow must be equipped with a broadhead hunting point at least 7/8-inch in width upon impact, with a minimum of two cutting edges. A mechanical broadhead must begin to open upon impact and when open must be a minimum of 7/8-inch in width.

(D) It is unlawful to hunt deer or turkey with a broadhead hunting point while in possession of a firearm during an archery-only season.

(E) Lawful archery equipment and crossbows are the only lawful means that may be used during archery-only seasons, except as provided in paragraph (3) of this section.

(3) Crossbow--Special Provisions.

(A) In Grayson County:

(i) no person may use a crossbow to hunt deer during the archery-only season (October 3 - November 6) unless the person has an upper-limb disability and has in immediate possession a physician's statement that certifies the extent of the disability; and

(ii) any person may hunt deer by means of crossbow during the general open season (November 7 - January 3) and the requirements of clause (i) of this subparagraph do not apply.

(B) When hunting turkey and all game animals other than squirrels by means of crossbow:

(i) the crossbow must have a minimum of 125 pounds of pull;

(ii) the crossbow must have a mechanical safety;

(iii) the crossbow stock must be not less than 25 inches in length; and

(iv) the bolt must conform with paragraph (2)(B) and (C) of this section.

(4) Falconry. It is lawful to hunt any game bird or game animal by means of falconry under the provisions of Subchapter K of this chapter (relating to Raptor Proclamation).

(5) Alligator.

(A) Legal devices for taking alligators in the wild are as follows:

(i) hook and line (line set);

(ii) alligator gig;

(iii) lawful archery equipment and barbed arrow;

(iv) hand-held snare with integral locking mechanism; and

(v) lawful firearms, in counties where take by firearm is allowed.

(B) A line of at least 300-pound test shall be securely attached to all taking devices other than firearms used to hunt alligators. Except as provided in this subsection, hook-bearing lines must be attached to a stationary object capable of maintaining a portion of the line above water when an alligator is caught on the line. A line attached to an arrow, snare, or gig must have a float attached when used to take alligators. The float shall be no less than six inches by six inches by eight inches, or, if the float is spherical, no less than eight inches in diameter.

(C) Line-set provisions.

(i) Hook-bearing lines may not be set prior to the general open season and shall be removed no later than sunset of the last day of the open season.

(ii) From sunset to one-half hour before sunrise:

(I) no person shall use any taking device other than line sets to hunt alligators; and

(II) no person shall set any baited line capable of taking an alligator and no person shall remove alligators from line sets.

(iii) On a property for which the department has issued hide tags, no person shall set more than one line per unused hide tag in possession.

(iv) On a property that is not in a county listed in paragraph (1)(E) of this section and for which the department has not issued hide tags, no person shall set more than one line.

(v) Line sets shall be inspected daily, and alligators shall be killed, tagged or documented, and removed immediately upon discovery.

(vi) All line sets on properties for which hide tags have been issued shall be secured at one end on the tract of land specified for the hide tags. All other line sets shall be secured at one end on private property.

(vii) Each baited line shall be labeled with a plainly visible, permanent, and legibly marked gear tag that contains:

(I) the full name and current address of the person who set the line;

(II) the hunting license number of the person who set the line; and

(III) a valid hide tag number, if the line is set on a property for which hide tags have been issued.

(6) Use of laser sighting devices. All provisions concerning hunter education requirements apply to persons hunting with laser sighting devices under this paragraph.

(A) Use of laser sighting devices by persons who are legally blind.

(i) A person who is legally blind may use a laser sighting device to hunt game animals and game birds during lawful hunting hours in open seasons, provided the person is assisted by a person who:

(I) is not legally blind;

(II) has a hunting license; and

(III) is at least 13 years of age.

(ii) A person who uses a laser sighting device under the provisions of this subparagraph must have in possession a signed statement from a physician or optometrist to the effect that the person is legally blind by the standard of Government Code, §62.104, and must present the statement to any peace officer or department employee acting within the scope of official duties.

(B) Use of laser sighting devices by persons who are physically disabled.

(i) A person with a physical disability may use a laser sighting device during lawful hunting hours in open seasons when assisted by a person who:

(I) is not legally blind or a person with a physical disability that renders the person incapable of using a traditional firearm sighting device;

(II) has a hunting license; and

(III) is at least 13 years of age.

(ii) A person who uses a laser sighting device under the provisions of this subparagraph must have in possession a signed statement from a physician or optometrist certifying that the person is incapable of using a traditional firearm sighting device.

(7) Special Provisions.

(A) Desert bighorn sheep. Except as provided in this paragraph, no motorized conveyance of any type shall be used to herd or harass desert bighorn sheep.

(B) Hunting by remote control. It is an offense for any person to hunt a wildlife resource by the means listed in this section if that person is not physically present and personally operating the means of take at the location where the hunting occurs during the time that the hunting occurs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 11, 2009.

TRD-200904000
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: October 1, 2009
Proposal publication date: June 19, 2009
For further information, please call: (512) 389-4775

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUCATION

CHAPTER 211. ADMINISTRATION

37 TAC §211.30

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §211.30, concerning Chief Administrator Responsibilities for Class B Waivers, without changes to the proposed text as published in the June 26, 2009, issue of the *Texas Register* (34 TexReg 4280) and will not be republished.

New 37 TAC §211.30, Chief Administrator Responsibilities for Class B Waivers, explains the chief administrator's responsibilities for the waiver request process for individuals with a Class B conviction or deferred adjudication within 5 years.

No comments were received regarding adoption of this new rule.

The new rule is adopted under Texas Occupations Code §1701.307, Issuance of License.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 11, 2009.

TRD-200903991
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: October 26, 2009
Proposal publication date: June 26, 2009
For further information, please call: (512) 936-7713

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CHAPTER 215. TRAINING AND EDUCATIONAL PROVIDERS AND RELATED MATTERS

37 TAC §215.15

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to Title 37, §215.15, concerning Enrollment Standards, with changes to the proposed text as published in the June 26, 2009, issue of the *Texas Register* (34 TexReg 4281) and will be republished.

The amendment adds language to 37 TAC §215.15, Enrollment Standards. Subsection (b) is added to identify factors considered for mitigating circumstances. Subsection (c) is amended to clarify enrollments requirements for basic peace officer licensing courses. Subsection (d) is amended to identify examinations required for enrollment to basic peace officer licensing courses. Subsection (e) is amended to clarify that academies may establish additional enrollment standards. Subsection (f) is added to reflect the effective date.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.255, Enrollment Qualifications.

§215.15. Enrollment Standards.

(a) In order for an individual to enroll in any basic licensing course that provides instruction in defensive tactics, arrest procedures, firearms, or use of a motor vehicle for law enforcement purposes, the academy must have on file:

(1) written documentation that the person is currently licensed by the commission; or

(2) if the individual is not licensed by the commission, documentation that the individual has been subjected to a search of local, state and national records to disclose any criminal record;

(A) is not currently charged with any criminal offense for which conviction would be a bar to licensure;

(B) community supervision history:

(i) has never been on court-ordered community supervision or probation for any criminal offense above the grade of a Class B misdemeanor or a Class B misdemeanor within the last ten years from the date of the court order; but

(ii) the commission may approve the application of an individual who received probation or court-ordered community supervision for a Class B misdemeanor at least five (5) years prior to enrollment if an agency administrator sufficiently demonstrates in writing with supporting documentation that mitigating circumstances exist with the case and with the individual applying for licensure, and that the public interest would be served by reducing the waiting period;

(C) conviction history:

(i) has never been convicted of an offense above the grade of a Class B misdemeanor or a Class B misdemeanor within the last ten years; but

(ii) the commission may approve the application of an individual who was convicted of a Class B misdemeanor at least five (5) years prior to enrollment if an agency administrator sufficiently demonstrates in writing with supporting documentation that mitigating circumstances exist with the case and with the individual applying for

licensure, and that the public interest would be served by reducing the waiting period.

(D) For purposes of this section, the commission will construe any court ordered community supervision, probation, or conviction for a criminal offense to be its closest equivalent under the Texas Penal Code classification of offenses if the offense arose from:

(i) another penal provision of Texas law; or

(ii) a penal provision of any other state, federal, military or foreign jurisdiction.

(E) A classification of an offense as a felony at the time of conviction will never be changed because Texas law has changed or because the offense would not be a felony under current Texas law.

(F) has never been convicted of any family violence offense;

(G) is not prohibited by state or federal law from operating a motor vehicle;

(H) is not prohibited by state or federal law from possessing firearms or ammunition; and

(I) is a U.S. citizen.

(b) In evaluating whether mitigating circumstances exist, the commission will consider the following factors:

(1) the applicant's history of compliance with the terms of community supervision;

(2) the applicant's continuing rehabilitative efforts not required by the terms of community supervision;

(3) the applicant's employment record;

(4) whether the disposition offense contains an element of actual or threatened bodily injury or coercion against another person under the Texas Penal Code or the law of the jurisdiction where the offense occurred;

(5) the required mental state of the disposition offense;

(6) whether the conduct resulting in the arrest resulted in the loss of or damage to property or bodily injury;

(7) the type and amount of restitution made by the applicant;

(8) the applicant's prior community service;

(9) the applicant's present value to the community;

(10) the applicant's post-arrest accomplishments;

(11) the applicant's age at the time of arrest; and

(12) the applicant's prior military history.

(c) In order for an individual to enroll in any basic peace officer training program that provides instruction in defensive tactics, arrest procedures, firearms, or use of a motor vehicle for law enforcement purposes, the academy must have on file:

(1) a high school diploma;

(2) a high school equivalency certificate; or

(3) an honorable discharge from the armed forces of the United States after at least 24 months of active duty service.

(d) In order for an individual to enroll in any basic peace officer training program that provides instruction in defensive tactics, arrest procedures, firearms, or use of a motor vehicle for law enforcement purposes, the academy must have on file:

(1) written documentation that the individual has been examined by a physician, selected by the appointing, employing agency, or the academy, who is licensed by the Texas Medical Board. The physician must be familiar with the duties appropriate to the type of license sought. The individual must be declared in writing by that professional to be:

(A) physically sound and free from any defect which may adversely affect the performance of duty appropriate to the type of license sought; and

(B) show no trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test; and

(2) written documentation that the individual has been examined by a psychologist, selected by the appointing, employing agency, or the academy, who is licensed by the Texas State Board of Examiners of Psychologists. The psychologist must be familiar with the duties appropriate to the type of license sought. This examination may also be conducted by a psychiatrist. The individual must be declared in writing by that professional to be in satisfactory psychological and emotional health to serve as the type of officer for which the license is sought. The examination must be conducted pursuant to professionally recognized standards and methods:

(A) the commission may allow for exceptional circumstances where a licensed physician performs the evaluation of psychological and emotional health. This requires the appointing agency to request in writing and receive approval from the commission, prior to the evaluation being completed; or

(B) the examination may be conducted by qualified persons identified by §501.004, Occupations Code. This requires the appointing agency to request in writing and receive approval from the commission, prior to the evaluation being completed.

(e) The enrollment standards established in this section do not preclude the licensed academy from establishing additional requirements or standards for enrollment in law enforcement training programs.

(f) The effective date of this section is October 26, 2009.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 11, 2009.

TRD-200903987
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: October 26, 2009
Proposal publication date: June 26, 2009
For further information, please call: (512) 936-7713

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CHAPTER 217. LICENSING REQUIREMENTS

37 TAC §217.9

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to Title 37,

§217.9, concerning Continuing Education Credit for Licensees, without changes to the proposed text as published in the June 26, 2009, issue of the *Texas Register* (34 TexReg 4282) and will not be republished.

The amendment adds language to 37 TAC §217.9, Continuing Education Credit for Licensees. Subsection (b) is amended to provide for refusal of licensing or certification courses by unlicensed or non-contractual training providers. Subsection (d) is amended to reflect the effective date of these changes.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.251, Training Programs; Instructors, §1701.353, Continuing Education Procedures, and §1701.402, Proficiency Certificates.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 11, 2009.

TRD-200903990

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Effective date: October 26, 2009

Proposal publication date: June 26, 2009

For further information, please call: (512) 936-7713

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CHAPTER 219. PRELICENSING AND REACTIVATION COURSES, TESTS, AND ENDORSEMENTS

37 TAC §219.2

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to Title 37, §219.2, concerning Reciprocity for Out-of-State Peace Officers, Federal Criminal Investigators, and Military Police, with changes to the proposed text as published in the June 26, 2009 issue of the *Texas Register* (34 TexReg 4283) and will be republished.

The amendment adds language to §219.2, Reciprocity for Out-of-State Peace Officers, Federal Criminal Investigators, and Military Police. The title will be amended to reflect the addition of military police personnel. Subsection (c) is amended to provide clarity for the eligibility requirements for out-of-state peace officers to qualify for an endorsement to attempt a state licensing examination. Subsection (f) is amended to add the military police occupational specialties. Subsection (g) is amended to add the military training and service time requirements. The following subsections were re-lettered due to these additions. Subsection (m) reflects the effective date of these changes.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.304, Examination.

§219.2. Reciprocity for Out-of-State Peace Officers, Federal Criminal Investigators, and Military Police.

(a) To be eligible to take a state licensing examination, an out of state, federal criminal investigator, or military police must comply with all provisions of §219.1 of this title and this section.

(b) Prospective out-of-state peace officer, federal criminal investigator, and military police applicants for peace officer licensing in Texas must:

(1) meet all statutory licensing requirements of the state of Texas and the rules of the Commission;

(2) successfully complete a supplementary peace officer training course, the curriculum of which is developed by the Commission; and

(3) successfully pass the Texas Peace Officer Licensing Examination.

(c) Requirements (Peace Officers): applicants who are peace officers from other U.S. states must meet the following requirements:

(1) provide proof of successful completion of a state POST-approved (or state licensing authority) basic police officer training academy (with equivalent course topics and hours of training at the time of initial certification or licensure);

(2) have honorably served (employed, benefits eligible) as a sworn peace officer for twelve consecutive months, following initial basic training, with an agency in the state where the license or certificate was issued;

(3) be subject to continued employment or eligible for rehire (excluding retirement); and

(4) the applicant's license or certificate must never have been, nor currently be in the process of being, surrendered, suspended, or revoked.

(d) Requirements (Federal): The Texas Code of Criminal Procedures Section 2.122 recognizes certain named criminal investigators of the United States as having the authority to enforce selected state laws by virtue of their authority. These individuals are deemed to have the equivalent training for licensure consideration.

(e) Qualifying Federal Officers must:

(1) have successfully completed an approved federal agency law enforcement training course (equivalent course topics and hours) at the time of initial certification or appointment;

(2) have honorably served (employed, benefits eligible) in one of the aforementioned federal capacities for twelve consecutive months, following initial basic training; and

(3) be subject to continued employment or eligible for rehire (excluding retirement).

(f) Requirements (Military): must have a military police military occupation specialty (MOS) or air force specialty code (AFSC) classification in one of the following:

(1) United States Army 95B or 31B;

(2) United States Marine Corps 5811;

(3) United States Air Force 3PO51, 3PO71, or 3PO91; or

(4) United States Navy Master at Arms or NEC 9545 and successfully completed NAVEDTRA 14137.

(g) Qualifying military personnel must provide proof of:

(1) successfully completed basic military police course for branch of military served; and

(2) served at least 24 months active duty in the designated career field.

(h) Procedures for requesting an endorsement to take state licensing examination:

(1) complete the Commission application for endorsement and have it properly notarized;

(2) attach a certified check or money order for the currently required fee (non-refundable); and

(3) submit the application and fee with all required documents to the Commission by U.S. mail, by courier, or in person.

(i) Required documents to accompany the application for endorsement:

(1) a certified or notarized copy of the basic training certificate for a peace officer, a certified or notarized copy of a federal agent's license or credentials, or a certified or notarized copy of the peace officer license or certificate issued by the state POST or proof of military training;

(2) a notarized statement from the state POST, current employing agency or federal employing agency revealing any disciplinary action(s) that may have been taken against any license or certificate issued by that agency or any pending action;

(3) a notarized statement from each applicant's employing agency confirming time in service as a peace officer or federal office or agent;

(4) a certified or notarized copy of the applicant's valid state-issued driver's license;

(5) a certified copy of the applicant's military discharge (DD-214), if applicable; and

(6) a passport-sized color photograph (frontal, shoulders and face), signed with the applicant's full signature on the back of the photograph.

(j) The Commission may request that applicants submit a copy of the basic and advanced training curricula for equivalency evaluation and final approval.

(k) All out-of-state, federal, and military applicants will be subject to a search of the National Decertification Database (NDD), NCIC/TCIC, and National Criminal History Databases to establish eligibility.

(l) All documents must bear original certification seals or stamps.

(m) The effective date of this section is October 26, 2009.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 11, 2009.

TRD-200903993

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Effective date: October 26, 2009

Proposal publication date: June 26, 2009

For further information, please call: (512) 936-7713

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CHAPTER 221. PROFICIENCY CERTIFICATES AND OTHER POST-BASIC LICENSES

37 TAC §221.15

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts the repeal of Title 37, §221.15, concerning Crime Prevention Inspector Proficiency, without changes to the proposed text as published in the June 26, 2009, issue of the *Texas Register* (34 TexReg 4285) and will not be republished.

The repeal of §221.15 is being adopted because the authority for that certificate, §5.33A, was repealed from the Insurance Code. The effective date of this repeal will be October 26, 2009.

No comments were received regarding adoption of this repeal.

The repeal is adopted under Texas Occupations Code §1701.402, Proficiency Certificates.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 11, 2009.

TRD-200903988

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Effective date: October 26, 2009

Proposal publication date: June 26, 2009

For further information, please call: (512) 936-7713

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37 TAC §221.21

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to Title 37, §221.21 concerning Firearms Proficiency for Community Supervision Officers, without changes to the proposed text as published in the June 26, 2009, issue of the *Texas Register* (34 TexReg 4285) and will not be republished.

The amendment adds language to 37 TAC §221.21, Firearms Proficiency for Community Supervision Officers. Subsection (b) is amended to reflect weapons proficiency requirements for community supervision officers. Subsection (c) is amended to reflect the expiration date for certificates issued under this section and stipulates requirements for renewal of the certificate for community supervision officers. Subsection (d) is added to establish the effective date of the amendments.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.257, Firearms Training Program for Supervision Officers.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 11, 2009.

TRD-200903989
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: October 26, 2009
Proposal publication date: June 26, 2009
For further information, please call: (512) 936-7713

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CHAPTER 223. ENFORCEMENT

37 TAC §223.7

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to Title 37, §223.7, concerning Contested Cases and Hearings, without changes to the proposed text as published in the June 26, 2009, issue of the *Texas Register* (34 TexReg 4286) and will not be republished.

The amendment adds language to 37 TAC §223.7, Contested Cases and Hearings. Subsection (b) is amended to allow for the Commission to recover transcription fees as allowed under §2001.059 of the Texas Government Code. Subsection (c) is added to establish the effective date of the amendments.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.505, Administrative Procedure and Texas Government Code, Chapter 2001, §2001.059.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 11, 2009.

TRD-200903992
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: October 26, 2009
Proposal publication date: June 26, 2009
For further information, please call: (512) 936-7713

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 10 TAC §60.121(k)

Noncompliance Event	Uncorrected Points	Corrected Points	Programs	If HTC, on Form 8823?
Major property condition violations	Material Noncompliance	10	All programs	Yes
Pattern of minor property condition violations	10	5	All programs	Yes
Administrative reporting of property condition violations	0	0	HTC	Yes
Owner refused to lease to a holder of rental assistance certificate/voucher because of the status of the prospective tenant as such a holder	Material Noncompliance	10	See §60.112	Yes
Owner failed to approve and distribute an Affirmative Marketing Plan as required under §60.112 of this chapter	10	3	See §60.112	No
Development failed to comply with requirements limiting minimum income standards for Section 8 residents.	10	3	See §60.112	No
Development is not available to general public	10	0	HTC	Yes
HUD or DOJ notification of possible Fair Housing Act violation	0	0	HTC	Yes
Determination of a violation under the Fair Housing Act	Material Noncompliance	10	All programs	Yes
Development is out of compliance and never expected to comply/ Foreclosure	Material Noncompliance	NA/No Correction possible	All programs	Yes
Owner did not allow on-site monitoring review	Material Noncompliance	5	All programs	Yes
LURA not in effect	Material Noncompliance	5	All programs	Yes
Development failed to meet minimum set aside	20	10	HTC Bonds	Yes
No evidence of, or failure to certify to, material participation of a non-profit or HUB, if required by the Land Use Restriction Agreement	10	3	HTC	Yes
Development failed to meet additional State required rent and occupancy restrictions	10	3	All programs	No
The Development failed to provide required supportive services as promised at Application	10	3	HTC Bonds	No

Noncompliance Event	Uncorrected Points	Corrected Points	Programs	If HTC, on Form 8823?
The Development failed to provide housing to the elderly as promised at Application	10	3	All programs	No
Failure to provide special needs housing	10	3	All programs	No
Changes in Eligible Basis or Applicable Percentage	3	NA, No Correction possible	HTC	Yes
Failure to submit part or all of the AOCR or failure to submit any other annual, monthly, or quarterly report required by the Department	10	3	All programs	Yes
Utility Allowance not calculated properly	20	10	All programs	Yes
Owner failed to execute required lease provisions, including language required by §60.110 or exclude prohibited lease language	10	3	HTC HOME	No
Failure to provide annual Housing Quality Standards inspection	10	3	HOME	NA
Development has failed to establish and maintain a reserve account in accordance with §1.37 of this title	Material Noncompliance	10	All programs	No
Development substantially changed the scope of services as presented at initial Application without prior Department approval	10	3	HTC	No
Change in Ownership or General Partner without proper notification to and approval of Department	10	3	All programs	No
Failure to provide a notary public as promised at Application	10	3	HTC	No
Violations of the Unit Vacancy Rule	3	1	HTC	Yes
Casualty loss	0	0	All programs	Yes

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas State Affordable Housing Corporation

Texas Foundations Fund Guidelines, Draft 2009 Avaliable for Public Comments

The Texas State Affordable Housing Corporation presents for public comment its draft 2009 Texas Foundations Fund Guidelines. A copy of the draft 2009 Texas Foundations Fund Guidelines may be found on the Corporation's website at www.tsahc.org. The public comment period for the Corporation's draft Texas Foundations Fund Guidelines is Monday, September 14, 2009 through Monday, September 28, 2009.

Written comment may be sent to Paige McGilloway, Single Family Programs Manager, 2200 East Martin Luther King Jr. Blvd., Austin, Texas 78702 or by email at pmcgilloway@tsahc.org.

TRD-200904058
David Long
President
Texas State Affordable Housing Corporation
Filed: September 15, 2009

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Texas Department of Agriculture

Request for Proposals: Texas Wine Regional Partnership Grants

Pursuant to Chapter 50B of the Texas Agriculture Code, Chapter 110 of the Texas Alcoholic Beverage Code, and 4 Texas Administrative Code §§17.200 - 17.202, the Texas Department of Agriculture (TDA) hereby requests proposals for Texas Wine Regional Partnership Grants for the period that begins September 1, 2009 through August 31, 2010.

Texas Wine Regional Partnership Grants will be allocated over the course of the biennium with $60,000 being allocated for *each* biennium year. The maximum amount of any one grant is $10,000. An eligible applicant will be allowed to apply for one grant during each fiscal year of the biennium. Each application with be evaluated and scored through a series of questions on a scoring matrix. Scoring categories will include Event History, Attendance, Feasibility, Benefit/Impact to the Texas wine industry, Public Interaction, and Industry/TDA Participation.

Texas Wine Regional Partnership Grants, under the direction of the Texas Wine Marketing Program, are designed to increase consumer awareness of Texas wines and expand markets for the industry. These grants are intended to promote Texas wines and Texas wine products.

The Texas Wine Partnership Grant Application can be obtained from TDA's web site at www.GOTEXANWINE.org, or by contacting the state coordinator for wine marketing, Bobby Champion Jr., at (512) 475-3303 or robert.champion@TexasAgriculture.gov.

Eligibility. An eligible applicant is a: (1) state, regional or independent organization that promotes the marketing of Texas agricultural products, in this case wine, and does not stand to profit directly from specific sales of agricultural commodities, (2) a cooperative organization defined under 4 Texas Administrative Code §17.301, (3) a state agency or board that markets the Texas wine industry, (4) a small business defined under 4 Texas Administrative Code §17.301, or (5) any other entity that promotes the Texas wine industry. An eligible applicant must also: (1) be encouraged to participate in TDA's GO TEXAN program, (2) meet the eligibility requirements set forth in the Texas Wine Regional Partnership Grant Application and TDA guidelines, and (3) be physically located or have its principal place of business in Texas. TDA has the sole discretion to determine whether an applicant meets eligibility requirements.

Project Proposal Requirements. Applicants must submit a project proposal in accordance with TDA guidelines. The proposal must describe the activity's direct benefit to the Texas wine industry, along with all advertising, marketing, or other promotional activities that will be carried out if funds are awarded to the applicant.

The project proposal must also include:

(1) a signed application including the event name, contact, phone number, city/address, Taxpayer ID number, date, and location of applicant(s)/business owner(s); (2) a detailed quote or budget showing how funds will be spent, including specific dollar amounts for all potential costs; (3) a one-page summary that describes the project, including the project's plan and methodology, and how the project will enhance the GO TEXAN program; (4) a description of how the project will benefit the Texas wine industry; (5) a description, if any, of market research indicating sales increases to be achieved as a result of the project; (6) a biography of the applicant and a description of the business entity; (7) a description of how the applicant will quantify and report the anticipated benefit to the industry. Additionally, the applicant will have to submit sworn statements, on form(s) provided by TDA, stating that the applicant: (1) is not currently delinquent in the payment of any franchise taxes owed to the State of Texas, (2) is not delinquent in child support under the Texas Family Code Section 231.006, (3) is not delinquent in a payment of a guaranteed student loan, and (4) does not have any existing or potential conflict of interest with TDA or the Texas Wine Industry Development Advisory Committee.

Proposals will be evaluated by TDA staff. Preference will be given to projects that: (1) benefit the Texas wineries; (2) are supported and endorsed by the Texas wine industry; (3) are in compliance with Texas Alcoholic Beverage Commission rules and regulations; (4) avoid duplication with other projects; and (5) enhance TDA's GO TEXAN Program. Texas Wine Regional Partnership grant awards will be announced by TDA after project approval.

All approved projects must be completed by August 31, 2011, or the date specified in the grant application and agreement, whichever is earlier.

All approved projects will be subject to audit and periodic reporting requirements.

Proposals should be submitted by fax, e-mail, hand-delivery, or regular mail to: Bobby Champion, Jr., Texas Wine Regional Partnership Grant Application Funding Coordinator:

Physical Address: Bobby Champion, Jr., Texas Department of Agriculture, 1700 North Congress Avenue, 11th Floor, Austin, Texas 78701.

Mailing Address: Bobby Champion, Jr., P.O. Box 12847, Austin, Texas 78711.

Mr. Champion may be contacted by telephone at (512) 475-3303, by fax at 1-888-223-7156, or by e-mail at robert.champion@TexasAgriculture.gov.

Proposals will be accepted by TDA on a continuous basis throughout the 2010 - 2011 biennium until depletion of all available Texas Wine Regional Partnership Grant funds, with a maximum award of $10,000 for each grant. There is no minimum amount for any grant award under this program.

Addenda, amendments, modifications, or supplements to an original response will not be considered. Oral amendments or modifications will not be considered. An unsigned proposal will not be accepted. All proposals become the property of TDA.

All costs directly or indirectly related to preparation of a response to this request for proposals or any oral presentation required to supplement and/or clarify the proposal which may be required by TDA shall be the sole responsibility of, and shall be borne by, the applicant.

Any information and documentation submitted to TDA is subject to disclosure under the Texas Public Information Act. However, until a selection is made, TDA will withhold, in accordance with state law, any information that might give advantage to a competitor or bidder with respect to this program. Applicants should clearly identify all confidential, proprietary, and/or trade secret information submitted as part of a proposal under this program.

TRD-200904076
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: September 16, 2009

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Ark-Tex Council of Governments

Request for Proposals for Environmental Assessment and Planning Services

RFP #EPA-OWSER-OBLR-08-07

Overview: The U.S. Environmental Protection Agency (USEPA) has awarded the Ark-Tex Council of Governments (ATCOG) a $400,000 Brownfields Hazardous Substances and Petroleum Assessment Grant. Grant funds will be used to conduct community involvement activities, perform Phase I and II Environmental Site Assessments, formulate cleanup plans, and develop a Remedial Reuse Strategy for sites in the ATCOG's region.

The ATCOG is currently seeking proposals from highly-qualified and experienced environmental consultants to perform environmental assessment and remedial planning activities, to facilitate community outreach events, and to assist with project management and grant administration of the USEPA grant. The proposals to be submitted must satisfy all of the required work elements in this request for proposals (RFP) for the ATCOG Brownfields Redevelopment Project.

The ATCOG's Brownfields Program involves the coordination of environmental and economic development initiatives, as well as extensive partnering with community groups, the financial and business communities, real estate professionals, developers, lenders, and state and local economic and environmental agencies.

The ATCOG is looking to contract with a minimum of two contractors on an as needed, if needed basis for assistance in administering the ATCOG's Brownfields Program.

INTRODUCTION

The ATCOG is seeking the services of a qualified consultant(s) for the purpose of conducting Environmental Assessments of parcels within their Region. The purposes of conducting the studies are to:

Determine if any environmental contamination is present in the study area.

Determine what, if any, cleanup planning is required to prepare the property for the reuse. The general scope of work for the consultant(s) to perform is included below.

SUMMARY OF PROJECT DESCRIPTION AND DELIVERABLES

The scope of services to be provided by the environmental consultant(s) are assumed to include:

General Assessment - A general background study will be performed to provide information necessary for the Phase I assessments, allow the ATCOG to rank or score sites as to the need for additional work under this grant, and identify environmental concerns in the area that may be a hindrance to future development. The background study will cover all properties identified in the target area.

In order to provide useful information for the Phase I assessments, the general assessment will complete the Records Review portion of the Phase I assessments in accordance with current "American Society for Testing and Materials" (ASTM) procedures for the identified properties and for the surrounding area. It is important that the work be completed in accordance with the current EPA-approved ASTM procedures so that it can be directly used in Phase I assessments.

Community Outreach - Community notification and outreach have been and will continue to be critical to the success of the project for the immediate neighborhoods and broader communities in the ATCOG's Region. A series of public meetings will be conducted to keep the public informed of the various components of Plan Implementation, including the administration and use of the Brownfields Grant. The consultant should anticipate a minimum of two public outreach events, which will include presentations (in layman's terms) on assessments sampling plans, methods and results, cleanup options and recommendations. Consultant support for public outreach events will require preparation of display boards, fact sheets and other necessary informational handouts.

Property Identification/Ranking - List of properties selected and prioritized for Phase I Environmental Assessment.

Property Assessments - Based on the types of potential contaminants identified from readily available historical information regarding the study area, the ATCOG anticipates Phase I assessments will be necessary on many of the properties, some may warrant Phase II assessments, and potentially subsequent Phase III cleanup plans. Phase I Assessments will be conducted in accordance with the current EPA and ASTM Standards as well as applicable requirements of the State. Phase II Assessments will be tailored to each identified site. They will also be conducted in compliance with ASTM Standards, as well as applicable requirements of the USEPA and State. Cleanup plans, when applicable, should include options and preliminary cost estimates.

Quality Assurance Project Plans - The EPA requires that all federally-funded environmental monitoring, sampling and measurement efforts participate in a centrally managed quality assurance program. Anyone generating data under this quality assurance program has the responsibility to implement procedures to ensure that the precision, accuracy and completeness of its data are known and documented. To meet this responsibility, EPA requires that for each Brownfields site, a

written Quality Assurance Project Plan (QAPP) be prepared and submitted to and approved by EPA prior to the commencement of sampling.

A QAPP and/or Field Sampling Plans from the selected contractor must be performed and approved by the ATCOG and the EPA prior to any Phase II onsite field work.

The ATCOG will review all environmental assessment proposals, QAPPs and subsequent work plans to determine if activities will meet the objectives of the Brownfields project before the start of assessment activities.

The QAPP should describe the measure that will be used to ensure that defensible and quality data are collected and reported for this project. QAPPs must describe and provide a rationale for selecting locations, types, quantities and analyses for proposed samples. QAPPs should also include general equipment and methods for proposed sampling and analyses with references to specific Federal, State and professional practice guidelines. Proposed analysis and measurement methods must be capable of reliably detecting concentrations equal to or below applicable cleanup standards for future land use.

Cleanup Planning - Analysis of cleanup options will be based on cleanup goals, methods and costs considered acceptable by the ATCOG, the community and/or State/Federal regulators. Specific evaluation criteria that the consultant will initially consider include the following: risk to public health, safety and environment (during and after redevelopment); implementability; effectiveness; applicability with Federal, State and local laws/regulations; degree of permanency; time; and cost.

MBE/WBE Utilization Requirements - In accordance with USEPA's program for utilization of Small (SBE), Minority (MBE) and Women's Business Enterprises (WBE), the contractor must ensure that opportunities are extended to qualified MBE/WBE firms (see 40 CVR 35.6580(a)).

The overall goal of the ATCOG's Brownfields Redevelopment Project is:

To create developable land within the ATCOG's Region for business expansion and public uses.

To eliminate blight.

To revitalize the Region by transitioning the area from post-industrial, agricultural, and/or vacant land to a vibrant mixed-use district.

To improve the health and safety of the adjacent residential neighborhoods.

MINIMUM QUALIFICATIONS FOR CONSULTING FIRMS

The consulting firms submitting proposals to the ATCOG shall address the following minimum qualifications in its proposals:

Experience in brownfields assessment and planning.

Extensive experience in environmental assessment. Experienced consultants will have previously worked on a USEPA Brownfields assessment project, developed a USEPA Quality Assurance Project Plan (QAPP), and have experience working in Arkansas and Texas.

Experience in facilitating community outreach and public relations to inform citizens about brownfields remediation issues.

Successful history of being a "team player" on multi-faceted development projects including working with other consultants, non-profit organizations, private developers, public officials, and the general public.

PROPOSAL SPECIFICS

In addition to the minimum qualifications information, all proposals submitted shall include the following information:

Company profile and experience.

Fee Schedule

Resume(s) of Qualified Personnel

Project Examples

ADDITIONAL REQUIREMENTS FOR APPLICATIONS PER USEPA

Per the directives of the USEPA, all applicants shall provide evidence of their fulfillment of or commitment to the following:

Use of recycled paper for all reports and documents to be submitted to USEPA.

Ensure that best efforts are made to achieve "Fair Share" goals for WBE/MBE in selection of any subcontractors.

Firms shall submit two (2) bound copies of their proposals to:

Mr. Paul Prange

Environmental Resources Planner

Ark-Tex Council of Goverments

4808 Elizabeth Street

Texarkana, Texas 75503

pprange@atcog.org

Submittal deadline is October 16, 2009 by 10:00 a.m.

Proposals must be submitted in a sealed envelope. The Request for Proposal number and the consultant's name and address should be clearly indicated on the outside of the envelope. All proposals must be completed in ink or typewritten. Questions must be addressed to the Officer listed above.

Respondents shall be evaluated on the completeness of their applications, as well as their experience, content and cost considerations. The ATCOG reserves the right to reject any and all bids based upon their evaluation of all of these considerations.

Notwithstanding any other provision of the Request for Proposal, the ATCOG reserves the right to:

Waive any immaterial defect or informality; or

Reject any or all proposals, or portions thereof; or

Reissue the Request for Proposal.

LATE PROPOSALS: Late proposals shall not be considered.

TRD-200904006
Sharon Pipes
Resource Assistant
Ark-Tex Council of Governments
Filed: September 11, 2009

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Office of the Attorney General

Notice of Settlement of a Texas Water Code Enforcement Action

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water Code. Before the State may settle a judicial enforcement action, pursuant to the Texas Water Code, the State shall permit the public

to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code.

Case Title and Court: Settlement Agreement in *Harris County, Texas and State of Texas v. Randall Roan, individually, and Randy Roan Construction, Inc.;* Cause No. 2009-07542, in the 333rd Judicial District, Harris County District Court.

Background: This suit alleges violations of the rules promulgated by the Texas Commission on Environmental Quality under the Texas Health and Safety Code related to the use of air curtain incinerators. The Defendants are Randall Roan and Randy Roan Construction, Inc. The suit seeks civil penalties, injunctive relief, attorney's fees, and court costs.

Nature of the Settlement: The settlement awards $46,000 in civil penalties to be divided between Harris County and the State of Texas, $10,000 of which is deferred subject to future compliance with Texas Commission on Environmental Quality rules, $3,000 in attorney's fees and court costs for the State of Texas, and $3,000 in attorney's fees and court costs for Harris County. The Judgment also requires the Defendants to cease all trench burning and air curtain incinerator burning in Harris County, Texas.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgment and written comments on the proposed settlement should be directed to Mark Steinbach, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-200904050
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: September 15, 2009

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439 - 1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of September 4, 2009, through September 10, 2009. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for this activity extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on September 16, 2009. The public comment period for this project will close at 5:00 p.m. on October 16, 2009.

FEDERAL AGENCY ACTIONS:

Applicant: Hilcorp Energy Company; Location: The project is located in wetlands and open water adjacent to Venado Creek, approximately 9.2 miles northeast of Port Lavaca, in Jackson County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Point Comfort, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 734019; Northing: 3182226.7. Project Description: The applicant proposes to discharge 13,208 cubic yards of fill material into 1.3 acres of freshwater, emergent wetlands and an 0.7 acre of open water during the construction of a 300-foot-wide by 300-foot-long drill site and the installation, operation and maintenance of structures; and equipment necessary for oil and gas drilling, production and transportation activities for the Ramon Musquiz, Abstract No. 59, West Ranch Gas Unit 1, No. 17 Well. The applicant proposes to purchase credits from an approved mitigation bank or an alternative mitigation proposal if one is not available. CCC Project No.: 09-0232-F1. Type of Application: U.S.A.C.E. permit application #SWG-2009-00678 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Railroad Commission of Texas under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: City of La Porte; Location: The project site is in Little Cedar Bayou, at a site located south of West Main Street and west of State Highway 146, in La Porte, Harris County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: La Porte, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 15; Easting: 303429; Northing: 3282825. Project Description: The applicant proposes to construct a stormwater detention basin facility, with a center pilot channel to reroute the flow of Little Cedar Bayou. The proposed project will reroute 3,918 linear feet of the Bayou, and will fill 0.85 acre of jurisdictional waters and wetlands to construct the basin, culverts, and erosion control structures. In addition, 9 outfall structures are proposed. CCC Project No.: 09-0233-F1. Type of Application: U.S.A.C.E. permit application #SWG-2008-01199 is being evaluated under §404 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Brownsville Navigation District; Location: The project is located along the north side of the Brownsville Ship Channel, between Oil Docks 3 and 5, in the Port of Brownsville, Cameron County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: EAST BROWNSVILLE, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 14; Easting: 661,793; Northing: 2,871,026. Project Description: The applicant proposes to construct a new bulk liquid terminal (Oil Dock 6) on the north side of the Brownsville Ship Channel with a 10-year period for maintenance dredging. The project site is currently an undeveloped parcel of land measuring approximately 1,425 feet in length. The project will include the construction of a vessel dock and associated berth along with various ancillary structures to support petroleum product loading and unloading activities. CCC Project No.: 09-0236-F1. Type of Application: U.S.A.C.E. permit application #SWG-2009-00689 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Brownsville Navigation District; Location: The project is located at the Brownsville Ship Channel between COE Sta. 80+493 and 81+493, immediately adjacent to and east of the existing Cargo Dock 15 at 13001 R. L. Ostos Road in Brownsville, Cameron County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: EAST BROWNSVILLE, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 14; Easting: 662,531; Northing: 2,872,152. Project Description: The applicant is requesting an amendment to Permit No 24245, issued 10 January 2007 and expiring 31 De-

cember 2011. The applicant is requesting that the following amendments be authorized under the existing Permit No. 24245: Expansion of the previously authorized Cargo Dock 16 by approximately 300 feet in length and 145 feet in width for a total length of 900 feet to tie into the existing Cargo Dock 15, Set back of shoreline protection along the eastern boundary of the project area by approximately 25 feet, Increase in dredge depths from -45 feet MLT to an ultimate dredge depth of -53 feet MLT in specific areas as noted on the permit drawings Sheets 4 and 5 of 11, Placement of an additional mooring structure, and Extension of time to complete construction to an additional 5 year period expiring in 2014 with a 5-year period for maintenance dredging expiring in 2019. CCC Project No.: 09-0240-F1. Type of Application: U.S.A.C.E. permit application #SWG-2006-00997 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403), §404 of the Clean Water Act (33 U.S.C.A. §1344), and §103 of the Marine Protection, Research, and Sanctuaries Act.

Applicant: Roy Robinson; Location: The project is located the Sabine-Neches Ship Channel, at 2954 South Gulfway Drive, in Port Arthur, Jefferson County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Arthur South, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 15; Easting: 407672; Northing: 3297352. Project Description: The applicant proposes to perform bank stabilization and to reclaim land for the construction of a proposed maritime support industry. The bank stabilization will consist of 687.73 linear feet of bulkhead. The land reclamation will consist of converting 0.5 acre of open water into uplands. The applicant proposes these bank stabilization activities in an effort to prevent further erosion of the shoreline for the proposed maritime support industry activities at the project site. The applicant will remove concrete rubble and riprap on the project site. CCC Project No.: 09-0241-F1. Type of Application: U.S.A.C.E. permit application #SWG-2009-00524 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451 - 1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above, including a copy the consistency certifications for inspection, may be obtained from Ms. Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200904054
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: September 15, 2009

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Comptroller of Public Accounts

Certification of the Average Taxable Price of Gas and Oil

The Comptroller of Public Accounts, administering agency for the collection of the Crude Oil Production Tax, has determined that the average taxable price of crude oil for reporting period August 2009, as required by Tax Code, §202.058, is $52.65 per barrel for the three-month period beginning on May 1, 2009, and ending July 31, 2009. Therefore, pursuant to Tax Code, §202.058, crude oil produced during the month of August 2009, from a qualified Low-Producing Oil Lease, is not eligible for exemption from the crude oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined that the average taxable price of gas for reporting period August 2009, as required by Tax Code, §201.059, is $3.04 per mcf for the three-month period beginning on May 1, 2009, and ending July 31, 2009. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of August 2009, from a qualified Low-Producing Gas Well, is eligible for 25% credit on the natural gas production tax imposed by Tax Code, Chapter 201.

Inquiries should be directed to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

TRD-200904042
Martin Cherry
General Counsel
Comptroller of Public Accounts
Filed: September 15, 2009

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Notice of Request for Applications

Pursuant to Chapters 403, 447 and 2305, Texas Government Code; and the American Recovery and Reinvestment Act of 2009, Public Law, PL-111-5 (ARRA or Act); and 10 Code of Federal Regulations (CFR) Parts 420 and 600; Executive Order (EO) RP-72 and related legal authority and regulations, the Comptroller of Public Accounts (Comptroller), State Energy Conservation Office (SECO), announces its Request for Applications (RFA #TR-AG2-2010) and invites applications from eligible interested governmental entities for grant assistance to implement traffic signal synchronization projects through the installation, updating and/or maintenance of traffic synchronization technologies and/or the replacement of traffic signal lights with Light-Emitting Diodes (LEDs) under the State Energy Plan (SEP). The Comptroller reserves the right to award more than one grant under the terms of the RFA. If a grant award is made under the terms of the RFA, Grantee will be expected to begin performance of the grant agreement on or about November 30, 2009, or as soon thereafter as practical.

Contact: Parties interested in submitting an application should contact William Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, in the Issuing Office at: 111 E. 17th St., Room 201, Austin, Texas 78774, (512) 305-8673, to obtain a complete copy of the RFA. The Comptroller will mail copies of the RFA only to those parties specifically requesting a copy. The RFA will be available for pick-up at the above referenced address on Friday, September 25, 2009, after 10:00 a.m. Central Zone Time (CZT) and during normal business hours thereafter. The Comptroller will also make the entire RFA available electronically on the Electronic State Business Daily (ESBD) at: http://esbd.cpa.state.tx.us after 10:00 a.m. CZT on Friday, September 25, 2009.

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and Non-mandatory Letters of Intent must be received at the above-referenced address not later than 2:00 p.m. (CZT) on Friday, October 2, 2009. Prospective applicants are encouraged to fax non-mandatory Letters of Intent and Questions to (512) 463-3669 to ensure timely receipt. Non-mandatory Letters of Intent must be addressed to William Clay Harris, Assistant General Counsel, Contracts, and must contain the information as stated in the corresponding Section of the RFA and be signed by an official of the entity. On or about Friday, October 9, 2009, the Comptroller expects to post responses to questions on the ESBD. Late Non-mandatory Letters of Intent and Questions will not be considered under any circumstances. Applicants shall be solely

responsible for verifying timely receipt of Non-Mandatory Letters of Intent and Questions in the Issuing Office.

Closing Date: Applications must be delivered in the Issuing Office to the attention of the Assistant General Counsel, Contracts, no later than 2:00 p.m. (CZT), on Friday, October 30, 2009. Late Applications will not be considered under any circumstances; Applicants shall be solely responsible for verifying time receipt of applications in the Issuing Office.

Evaluation Criteria: Applications will be evaluated under the criteria outlined in the RFA. The Comptroller will make the final decision. The Comptroller reserves the right to accept or reject any or all applications submitted. The Comptroller is not obligated to execute a grant agreement on the basis of this notice or the distribution of any RFA. The Comptroller shall not pay for any costs incurred by any entity in responding to this Notice or to the RFA.

The anticipated schedule of events pertaining to this RFA is as follows: Issuance of RFA - September 25, 2009, after 10:00 a.m. CZT; Non-Mandatory Letters of Intent and Questions Due - October 2, 2009, 2:00 p.m. CZT; Official Responses to Questions posted - October 9, 2009; Applications Due - October 30, 2009, 2:00 p.m. CZT; Grant Agreement Execution - November 30, 2009, or as soon thereafter as practical; Commencement of Project - November 30, 2009, or as soon thereafter as practical.

TRD-200904068
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: September 16, 2009

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Notice of Request for Applications

Pursuant to Chapters 403, 447 and 2305, Texas Government Code; and the American Recovery and Reinvestment Act of 2009, Public Law, PL-111-5 (ARRA or Act); and 10 Code of Federal Regulations (CFR) Parts 420 and 600; Executive Order (EO) RP-72 and related legal authority and regulations, the Comptroller of Public Accounts (Comptroller), State Energy Conservation Office (SECO), announces its Request for Applications (RFA #RE-AG1-2010) and invites applications from eligible interested governmental entities for grant assistance to assist them in initiatives to increase the amount of installed renewable energy in Texas, further develop Texas' renewable energy potential, assist in meeting the state's Renewable Portfolio Standard target of ten thousand megawatts (10,000 MW) by the year 2025, and advance the market for renewable technologies. The Comptroller reserves the right to award more than one grant under the terms of the RFA. If a grant award is made under the terms of the RFA, Grantee will be expected to begin performance of the grant agreement on or about December 4, 2009, or as soon thereafter as practical.

Contact: Parties interested in submitting an application should contact William Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, in the Issuing Office at: 111 E. 17th St., Room 201, Austin, Texas 78774, (512) 305-8673, to obtain a complete copy of the RFA. The Comptroller will mail copies of the RFA only to those parties specifically requesting a copy. The RFA will be available for pick-up at the above referenced address on Friday, September 25, 2009, after 10:00 a.m. Central Zone Time (CZT) and during normal business hours thereafter. The Comptroller will also make the entire RFA available electronically on the Electronic State Business Daily (ESBD) at: http://esbd.cpa.state.tx.us after 10:00 a.m. CZT on Friday, September 25, 2009.

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and Non-mandatory Letters of Intent must be received at the above-referenced address not later than 2:00 p.m. (CZT) on Friday, October 2, 2009. Prospective applicants are encouraged to fax non-mandatory Letters of Intent and Questions to (512) 463-3669 to ensure timely receipt. Non-mandatory Letters of Intent must be addressed to William Clay Harris, Assistant General Counsel, Contracts, and must contain the information as stated in the corresponding Section of the RFA and be signed by an official of the entity. On or about Friday, October 9, 2009, the Comptroller expects to post responses to questions on the ESBD. Late Non-mandatory Letters of Intent and Questions will not be considered under any circumstances. Applicants shall be solely responsible for verifying timely receipt of Non-Mandatory Letters of Intent and Questions in the Issuing Office.

Closing Date: Applications must be delivered in the Issuing Office to the attention of the Assistant General Counsel, Contracts, no later than 2:00 p.m. (CZT), on Friday, October 30, 2009. Late Applications will not be considered under any circumstances; Applicants shall be solely responsible for verifying time receipt of applications in the Issuing Office.

Evaluation Criteria: Applications will be evaluated under the criteria outlined in the RFA. The Comptroller will make the final decision. The Comptroller reserves the right to accept or reject any or all applications submitted. The Comptroller is not obligated to execute a grant agreement on the basis of this notice or the distribution of any RFA. The Comptroller shall not pay for any costs incurred by any entity in responding to this Notice or to the RFA.

The anticipated schedule of events pertaining to this RFA is as follows: Issuance of RFA - September 25, 2009, after 10:00 a.m. CZT; Non-Mandatory Letters of Intent and Questions Due - October 2, 2009, 2:00 p.m. CZT; Official Responses to Questions posted - October 9, 2009; Applications Due - October 30, 2009, 2:00 p.m. CZT; Grant Agreement Execution - December 4, 2009, or as soon thereafter as practical; Commencement of Project - December 4, 2009, or as soon thereafter as practical.

TRD-200904069
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: September 16, 2009

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Notice of Request for Proposals

Pursuant to Chapters 403; 2254, Subchapter A, Texas Government Code; and Article VII-35, Rider 57, Senate Bill No. 1 (S.B. 1), General Appropriations Act, 81st Texas Legislature, Reg. Sess. (2009), the Comptroller of Public Accounts (Comptroller), announces this issuance of a Request for Proposals (RFP #195c) for the purpose of obtaining professional accounting services to conduct a cost-accounting review of highway and bridge projects awarded by the Texas Department of Transportation (TxDOT) in each of the last five (5) fiscal years (Review). The successful respondent, if any, will be expected to begin performance of the contract on or about October 23, 2009, or as soon thereafter as practical.

Contact: Parties interested in submitting a proposal should contact William Clay Harris, Assistant General Counsel for Contracts, Comptroller of Public Accounts, 111 E. 17th St., Room 201, Austin, Texas 78774, telephone number: (512) 305-8673, to obtain a copy of the RFP. The Comptroller will mail copies of the RFP only to those specifically requesting a copy. The RFP will be available for pick-up at the above-referenced address on September 25, 2009, after 10:00 a.m.,

Central Zone Time (CZT), and during normal business hours thereafter. The Comptroller also made the RFP available electronically on the Electronic State Business Daily (ESBD) after 10:00 a.m. (CZT) on September 25, 2009, at: (http://esbd.cpa.state.tx.us).

Non-Mandatory Letters of Intent and Questions: Letters of Intent are non-mandatory. All written inquiries, questions and non-mandatory Letters of Intent must be received at the above-referenced address no later than 2:00 p.m. (CZT) on October 2, 2009. Prospective proposers are encouraged to fax non-mandatory Letters of Intent and Questions to (512) 463-3669 to ensure timely receipt. Letters of Intent must be addressed to William Clay Harris, Assistant General Counsel, Contracts, and must be signed by an authorized representative of that entity. Comptroller anticipates that responses to questions received by the deadline will be posted electronically on Friday, October 9, 2009, on the ESBD at: http://esbd.cpa.state.tx.us Non-Mandatory Letters of Intent and Questions received after the deadline will not be considered. Respondents shall be solely responsible for confirming the timely receipt of Non-Mandatory Letters of Intent and Questions in the Issuing Office.

Closing Date: Proposals must be received in the Assistant General Counsel for Contracts' Office at the location specified above in Room 201 no later than 2:00 p.m. (CZT), on Friday, October 16, 2009. Proposals received after this time and date will not be considered; respondents shall be solely responsible for verifying timely receipt of proposals and all required copies in the Issuing Office by the deadline.

Evaluation and Award Procedure: All proposals will be subject to evaluation by a committee based on the evaluation criteria and procedures set forth in the RFP. The Comptroller will make the final decision. The Comptroller reserves the right to accept or reject any or all proposals submitted. The Comptroller is not obligated to execute a contract on the basis of this notice or the distribution of any RFP. The Comptroller shall not pay for any costs incurred by any entity in responding to this Notice or the RFP.

The anticipated schedule of events pertaining to this solicitation is as follows: Issuance of RFP - Friday, September 25, 2009, after 10:00 a.m. CZT; Non-Mandatory Letters of Intent and Questions Due - Friday, October 2, 2009, 2:00 p.m. CZT; Official Responses to Questions posted - Friday, October 9, 2009, Proposals Due - Friday, October 16, 2009, 2:00 p.m. CZT; Contract Execution - October 23, 2009, or as soon thereafter as practical; Commencement of Contract Activities - October 23, 2009.

TRD-200904067
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: September 16, 2009

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 09/21/09 - 09/27/09 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 09/21/09 - 09/27/09 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200904038
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: September 14, 2009

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Credit Union Department

Application to Amend Articles of Incorporation

Notice is given that the following application has been filed with the Credit Union Department (Department) and is under consideration:

An application for a name change was received from Abilene State School Credit Union, Abilene, Texas. The credit union is proposing to change its name to People's Credit Union of Abilene.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200904063
Harold E. Feeney
Commissioner
Credit Union Department
Filed: September 16, 2009

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Applications for a Merger or Consolidation

Notice is given that the following applications have been filed with the Credit Union Department (Department) and are under consideration:

An application was received from America's Credit Union (Garland) seeking approval to merge with Texas Employees Credit Union (Dallas), with America's Credit Union being the surviving credit union.

An application was received from ACG Textile Employees Credit Union (Littlefield) seeking approval to merge with WesTex Federal Credit Union (Lubbock), with WesTex Federal Credit Union being the surviving credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200904064
Harold E. Feeney
Commissioner
Credit Union Department
Filed: September 16, 2009

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Notice of Final Action Taken

In accordance with the provisions of 7 TAC §91.103, the Credit Union Department (Department) provides notice of the final action taken on the following applications:

Application(s) to Expand Field of Membership - Approved

EDS Credit Union (#1), Plano, Texas - See *Texas Register* issue, dated July 31, 2009.

EDS Credit Union (#4), Plano, Texas - See *Texas Register* issue, dated July 31, 2009.

TRD-200904065
Harold E. Feeney
Commissioner
Credit Union Department
Filed: September 16, 2009

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Texas Education Agency

Public Notice Announcing the Availability of Waiver Requests Under the American Recovery and Reinvestment Act of 2009

Purpose and Scope of the Waiver Requests. The American Recovery and Reinvestment Act (ARRA) of 2009 provides significant new funding for programs under the Elementary and Secondary Education Act of 1965 (ESEA), Title I, Part A. Specifically, the ARRA provides $10 billion in additional fiscal year 2009 Title I, Part A, funds to local educational agencies (LEA) for schools that have high concentrations of students from families that live in poverty in order to help improve teaching and learning for students most at risk of failing to meet state academic achievement standards. In its Title I, Part A, ARRA fact sheet and guidance, the U.S. Department of Education indicated that the secretary of education would consider certain waiver requests with respect to ARRA funding, such as (1) waivers to permit an LEA to exclude ARRA funds when making certain fiscal and "set-aside" calculations. "Set asides" are funds an LEA must reserve in order to meet statutory obligations; (2) waivers related to the limitation on carryover for an LEA that has excess Title I, Part A, funds; (3) waivers to allow Title I campuses and LEAs under Title I School Improvement Program (SIP) requirements to serve as supplemental educational services (SES) providers. Currently, without a waiver, Title I campuses and LEAs under Title I SIP requirements may not serve as SES providers; and (4) waivers of the maintenance-of-effort requirement. Maintenance-of-effort is a federal requirement that requires grant recipients to maintain a certain level of fiscal effort to be eligible for participation in federal grant funding.

Specifically, the Texas Education Agency (TEA) will apply for waiver requests on behalf of Texas LEAs for (1) 20% School Choice-Related Transportation and SES on a limited basis; (2) SES Per-Pupil amount calculations on a limited basis; (3) reservation of funds for comparable services to homeless students; (4) six-month transition periods for paraprofessionals to meet Title I requirements on new Title I ARRA campuses; and (5) Title I campuses and LEAs under Title I SIP requirements to serve as SES providers.

The proposed waiver requests will promote improved quality of instruction for students and improve the academic achievement of students by providing each LEA with flexibility to spend ARRA funds that the LEA would otherwise be obligated to spend on SES or choice-related transportation on other allowable Title I, Part A, activities that the LEA believes best address the particular needs of its students. SES provide additional academic instruction designed to increase the academic achievement of students in Title I schools that are identified in stage two for school improvement, corrective action, or restructuring. Public school choice is a critical component of ESEA because it offers a student enrolled in a Title I school that is identified for school improvement, corrective action, or restructuring an opportunity to attend a public school that has not been so identified.

Texas must ensure in the waiver requests that the state has met or will meet all of the eligibility requirements outlined by the U.S. Department of Education and authorized in statute under the ESEA, Section 9401.

Availability of the Proposed Waiver Requests. Comments may be submitted regarding any of these waiver requests. To ensure that comments have maximum effect, commenters should clearly identify the specific proposed waiver criteria that each comment addresses. Parties interested in reviewing the Proposed Waiver Requests should contact the TEA Division of NCLB Program Coordination at (512) 463-9474. The review and comment period will commence on September 25, 2009, and conclude on October 9, 2009.

Assistance to Individuals with Disabilities in Reviewing the Proposed Waiver Requests. On request the TEA will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public record for this notice. To schedule an appointment for this type of accommodation or auxiliary aid, contact the person listed in the Further Information section of this notice.

Procedures for Submitting Written Comments About the Proposed Waiver Requests. The TEA will accept written comments pertaining to the Proposed Waiver Requests by mail to the Texas Education Agency, Division of NCLB Program Coordination, ATTN: ARRA Waivers, 1701 North Congress Avenue, Austin, Texas 78701, or by email to NCLBissues@tea.state.tx.us.

Timetable for Submitting Proposed Waiver Requests Under the ARRA of 2009. After review and consideration of all public comments, the TEA will make necessary/appropriate modifications and will submit the State Waiver Request on or before October 19, 2009.

Further Information. For more information, contact Heather Mauze with the TEA Division of NCLB Program Coordination by mail at 1701 North Congress Avenue, Austin, Texas 78701; by telephone at (512) 463-9374; by fax at (512) 305-9447; or by email at NCLB@tea.state.tx.us.

TRD-200904079
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: September 16, 2009

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Request for Applications Concerning 2009-2010 Investment Capital Fund Grant, Cycle 19, Year 1

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-09-115 from school districts and open-enrollment charter schools on behalf of an individual campus. A multi-campus school district or open-enrollment charter school may submit more than one application; however, each application must address strategies and activities for a single campus and its community. Each campus for which an application is submitted must be rated *Academically Unacceptable* in 2009 under the state accountability rating system or be identified on the Technical Assistance Team list issued in November 2009. The school must have demonstrated a commitment to campus deregulation and to restructuring educational practices and conditions at the school by entering into a partnership with school staff, parents of students at the school, community and business leaders, school district officers, and a nonprofit community-based organization. The nonprofit organization must have

a demonstrated capacity to train, develop, and organize parents and community leaders into a large, nonpartisan constituency that will hold the school and the school district accountable for achieving high academic standards.

Description. The purpose of the 2009-2010 Investment Capital Fund Grant, Cycle 19, is to improve student achievement through deregulation and restructuring that includes staff development and parent and community training and may also include strategies designed to enrich or extend student learning experiences outside of the regular school day.

Dates of Project. The 2009-2010 Investment Capital Fund Grant, Cycle 19, is intended to be a four-year project with each grantee receiving a maximum award of $50,000 for each year. Year 1 is intended to be a planning phase. Applicants should plan for a Year 1 starting date of no earlier than April 1, 2010, and an ending date of no later than October 31, 2010.

Project Amount. Funding will be provided for approximately 90 awards. Each grantee will receive a maximum of $50,000 for the Year 1 planning phase. Grantees that satisfactorily complete planning milestones will be eligible for continuation funding for up to three additional years at $50,000 each year. Approximately $4,497,478 will be available for funding. This project is funded 100 percent from state funds.

Selection Criteria. Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. RFAs are no longer available in print. The announcement letter and complete RFA will be posted on the TEA website at http://burleson.tea.state.tx.us/GrantOpportunities/forms for viewing and downloading. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Further Information. For clarifying information about the RFA, contact James Connolly, Division of Discretionary Grants, Texas Education Agency, (512) 463-9269. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any and all questions must be submitted in writing to the TEA contact persons identified in Part 2: Program Guidelines of the RFA. All questions and the written answers thereto will be posted on the TEA website in the format of Frequently Asked Questions (FAQs) at http://burleson.tea.state.tx.us/GrantOpportunities/forms. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Deadline for Receipt of Applications. Applications must be received in the TEA Document Control Center by 5:00 p.m. (Central Time), Thursday, December 3, 2009, to be eligible to be considered for funding.

TRD-200904077
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: September 16, 2009

Request for Applications Concerning Collaborative Dropout Reduction Pilot Program, Cycle 3

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-10-102 from Texas local education agencies, open-enrollment charter schools, and shared service arrangements of school districts and/or open-enrollment charter schools. Applicants must meet either of the following two eligibility requirements: (1) During each of the three school years preceding application for this grant (i.e., 2006-2007, 2007-2008, and 2008-2009), 55 percent or more of students enrolled in the district or open-enrollment charter school were identified as being economically disadvantaged; or (2) The district's annual dropout rate for Grades 7-12 was in the top ten percent of its comparable size category for each of school years 2005-2006, 2006-2007, and 2007-2008. The list of eligible districts will be posted on the TEA Grant Opportunities page at http://burleson.tea.state.tx.us/GrantOpportunities/forms/. Current grantees under the Collaborative Dropout Reduction Pilot Program, Cycles 1 and 2, are not eligible to apply.

Additional eligibility requirements apply. See the RFA for details. Instructions for obtaining the RFA are included in the Requesting the Application section of this notice.

Description. The purpose of the Collaborative Dropout Reduction Pilot Program, Cycle 3, is to provide funding to eligible applicants to either create a new program or expand/enhance an existing one by implementing collaboration among local entities to provide a comprehensive program to reduce the number of students who drop out of school. The pilot program is designed to foster collaboration among local businesses, other local government or law-enforcement agencies, nonprofit organizations, faith-based organizations, and institutions of higher education (IHEs) to deliver proven, research-based dropout intervention services. Regardless of which other entities comprise the collaborative partnership, programs must include a formal partnership with at least one IHE, the local/regional workforce council or board, and at least one middle school in the feeder pattern for the high school(s) served by the program. Eligible applicants must collaborate with local community organizations to implement comprehensive pilot programs to reduce the number of students who drop out of school and increase job skills, employment opportunities, and continuing education opportunities for students who might otherwise have dropped out of school.

Dates of Project. The Collaborative Dropout Reduction Pilot Program, Cycle 3, grant will be implemented during the 2009-2010, 2010-2011, and 2011-2012 school years. Applicants should plan for a starting date of no earlier than March 1, 2010, and an ending date of no later than February 29, 2012.

Project Amount. Funding will be provided for approximately four to six projects. Each project will receive a maximum of $250,000 for the 2009-2012 project period. This project is funded 100 percent with state funds.

Selection Criteria. Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and

validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. RFAs are no longer available in print. The announcement letter and complete RFA will be posted on the TEA website at http://burleson.tea.state.tx.us/GrantOpportunities/forms for viewing and downloading. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Applicants' Conference. An applicants' conference will be held on Tuesday, October 13, 2009, from 10:45 a.m. to 11:45 a.m. on the Texas Educational Telecommunication Network (TETN) available at each regional education service center (ESC) (TETN Event #5986). To locate the nearest TETN facility, applicants should contact the TETN site manager at their regional ESC. A complete list of ESCs, including contact information, is available on the TEA website at http://www.tea.state.tx.us/ESC/.

Questions relevant to the RFA may be sent to Chris Caesar at Chris.Caesar@tea.state.tx.us or faxed to (512) 463-4246 prior to Thursday, October 8, 2009. These questions, along with other information, will be addressed in the presentation. The conference will be open to all potential applicants and will provide general and clarifying information about the program and RFA.

The entire applicants' conference will be digitally recorded. Prospective applicants who are not able to attend the applicants' conference may request a password and procedures to download the video stream from the TETN site manager at their local ESC.

Further Information. For clarifying information about the RFA, contact Donnell Bilsky, Division of Discretionary Grants, Texas Education Agency, (512) 463-9269. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any and all questions must be submitted in writing to the TEA contact persons identified in Part 2: Program Guidelines of the RFA. All questions and the written answers thereto will be posted on the TEA website in the format of Frequently Asked Questions (FAQs) at http://burleson.tea.state.tx.us/GrantOpportunities/forms. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Deadline for Receipt of Applications. Applications must be received in the TEA Document Control Center by 5:00 p.m. (Central Time), Thursday, November 12, 2009, to be eligible to be considered for funding.

TRD-200904078
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: September 16, 2009

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Employees Retirement System of Texas

Contract Award Announcement

This contract award notice is being filed by the Employees Retirement System of Texas ("ERS"), in relation to a contract award for reconciliation of ERS' Eagle STAR ledger and sub-ledger accounts, and reconciliation of ERS' Eagle accounts with the external global custodian. The contractor is Huron Consulting Services LLC ("Huron"), 550 West Van Buren Street, Chicago, Illinois 60607. Provided that Huron's performance under the contract meets progress goals acceptable to ERS, the value of the contract is estimated at $76,250, but the value may vary pursuant to the contract's terms. The contract was executed on September 11, 2009 and the term of the contract is from September 9, 2009 through August 31, 2010. Reports that Huron may be required to present to ERS will be determined as part of the progress goals acceptable to ERS pursuant to the terms of the contract.

TRD-200904053
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Filed: September 15, 2009

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Request for Proposals to Conduct Audits of Certain Health, Welfare and Prescription Drug Programs

In accordance with §1551.055 and §1551.062 of the Texas Insurance Code ("TIC"), the Employees Retirement System of Texas ("ERS") is soliciting proposals from qualified auditing firms to perform audits of selected Carriers, HMOs and Third Party Administrators ("TPA") of the HealthSelect Programs, which include medical and pharmacy benefit programs, provided to participants under the Texas Employees Group Benefits Program ("GBP") beginning September 1, 2010 through August 31, 2014. A qualified provider of auditing services ("Vendor") shall supply the level of services required in the Request for Proposal ("RFP") and meet other requirements that are in the best interest of ERS, the GBP health and welfare programs, its participants, or the state of Texas, and shall be required to execute a Contractual Agreement ("Contract") provided by and satisfactory to ERS.

As provided in Chapter 1551 of the TIC, ERS is the administrator for the GBP which provides health and welfare benefits to over 500,000 state agencies and certain higher education employees, retirees, and their dependents. ERS is responsible for contracting with health, dental, life, and disability carriers, and third party administrators to provide coverage for GBP participants or administer such coverage throughout the state of Texas. The services requested and described in the RFP have been broken into two separate scopes of audit services: 1) statistical sample audit for the GBP Health and Welfare Programs, and 2) a full, pharmacy benefit management contract audit. Qualified Vendors may submit a proposal and bid response materials to provide services for one, or both audit scopes. A Vendor wishing to respond to this request shall meet the minimum requirements as well as those other evaluation criteria as more fully specified in Article II of the RFP. Each proposal will be evaluated individually and relative to the proposal of other qualified Vendors.

The RFP will be available in late September from ERS' website and will include documents for the Vendor's review and response. To access the secured portion of the RFP website, interested Auditors shall email their request to the attention of IVendor Mailbox at: ivendorquestions@ers.state.tx.us. The email request shall reflect the Vendor's legal name, street address, phone and fax numbers, and email address for the organization's direct point of contact. Upon receipt of this information,

a user ID and password will be issued to the requesting organization that will permit access to the secured RFP when the document is published on the Vendor portion of the ERS website.

General questions concerning the RFP and/or ancillary bid materials should be sent to the IVendor Mailbox where responses, if applicable, are updated frequently. The PBM scope of the RFP will be discussed at a web conference on Wednesday, October 21, 2009, beginning at 2:00 p.m. (CT). Vendors interested in bidding on the PBM scope of services are required to register for participation in the web conference no later than close of business on Friday, October 16, 2009, by emailing an acknowledgment to the IVendor Mailbox as referenced above.

To be eligible for consideration, all Vendors are required to submit a total of six (6) sets of the proposal in a sealed container. One (1) proposal shall be labeled as an "Original" and include a fully executed Signature page and Business Associate Agreement ("BAA"), **signed in blue ink,** and without amendment or revision. Three (3) additional duplicates of the proposal, including all required exhibits, shall be provided in printed format. Finally, two (2) complete copies shall be submitted on CD-ROMs in Excel or Word format. No PDF documents (with the exception of financial materials) may be reflected on the CD-ROMs. All materials shall be executed as noted above and must be received by ERS no later than 12:00 Noon (CT) on November 11, 2009.

ERS reserves the right to reject any and/or all proposals and/or call for new proposals if deemed by ERS to be in the best interests of the GBP, its participants or ERS. ERS also reserves the right to reject any proposal submitted that does not fully comply with the RFP's instructions and criteria. ERS is under no legal requirement to execute a Contractual Agreement on the basis of this notice or upon issuance of the RFP and will not pay any costs incurred by any entity in responding to this notice or the RFP or in connection with the preparation thereof. ERS specifically reserves the right to vary all provisions set forth at any time prior to execution of a contract where ERS deems it to be in the best interest of ERS, the GBP health and welfare programs, its participants or the state of Texas.

TRD-200904029
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Filed: September 14, 2009

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Texas Board of Professional Engineers

Policy Advisory Opinion Regarding Construction Materials Engineering

The Texas Board of Professional Engineers is given authority to issue Advisory Opinions under Subchapter M, Chapter 1001 of the Occupations Code (Texas Engineering Practice Act). The Board is required to issue an advisory opinion about interpretations of the Texas Engineering Practice Act in regard to a specific existing or hypothetical factual situation if requested by a person and to respond to that request within 180 days. Pursuant to that requirement, the Board hereby presents the following final Policy Advisory Opinion regarding Construction Materials Engineering. The Board, upon a written request to issue a Policy Advisory regarding the engineering aspects of construction materials engineering, has developed a stakeholder process to gather information from professional engineers, architects and consultants. The Texas Board of Professional Engineers approved the "Policy Advisory Opinion Regarding Construction Materials Engineering" on August 20, 2009 in a public meeting.

Executive Summary: The assessment of a construction material for quality, appropriateness and acceptability is considered by the Board to be an engineering activity. These Construction Materials Engineering (CME) activities must be performed by licensed professional engineers. Construction materials testing (CMT), within the context of CME includes collecting samples, performing well-defined test procedures, and reporting of data. In certain situations, performing tests and construction materials sampling using well-defined engineering specifications may not be considered engineering activities.

Discussion: On construction projects, engineers are called upon to assess the quality, appropriateness and acceptability of the materials that are used. These assessments are known collectively as CME. The CME includes the determination of the scope and procedures of testing for the project, the supervision of testing, and the analysis of test results for construction material acceptance purposes or for use in engineering recommendations. Although we most commonly associate CME with the analysis of concrete and soil, CME is conducted on any material used in construction including but not limited to timber, asphaltic concrete, steel, selected fill materials, recycled materials, aggregates, epoxies, and polymers.

Because it is engineering, CME must be personally performed by a licensed engineer or be directly supervised by a licensed engineer, and can only be offered to the public in full conformance with the Texas Engineering Practice Act (Act). Any CME activities that are contracted by a political subdivision of the State of Texas or an agency of the state, or on the political subdivision or agency's behalf, must be acquired in conformance with the Professional Services Procurement Act, Article 2254.004 of the Texas Government Code.

The CMT, within the context of CME includes collecting samples, performing well-defined test procedures, and reporting of data. In certain situations, performing tests and sampling by using well-defined engineering specifications may not be considered engineering activities. However, if analysis of test data is done or a determination is made that a material is acceptable, these activities would be considered to be CME and require a licensed professional engineer. Because the engineer is responsible for accepting the public works project, acceptance or rejection of materials or work, the direct supervision by an engineer of CMT for those acceptance decisions is needed.

Public Works: When constructing public works, the state or political subdivision of the state must ensure that the engineering construction is performed under the direct supervision of a licensed engineer (§1001.407, Occupations Code). This supervision must include the direct supervision of materials testing and engineering necessary and appropriate for verification of compliance with construction plans and acceptance of the project by the public owner.

A licensed professional engineer must directly supervise any element of acceptance testing, from data collection to final determination. When engineers are hired for these services, they must be retained under the Professional Services Procurement Act (PSPA). The CMT services unrelated to acceptance testing might be acquired using other purchasing procedures provided the CMT services do not include any CME function. For public entities with staff engineers who make acceptance decisions, the engineers must be in a position to determine if the testing and inspection services are properly performed at a frequency that provides confidence that the materials and work meet (or reasonably conform in some cases) the contract requirements or standards of practice. This requires reviewing qualifications, monitoring inspection and testing services and review of test and inspection data.

The validity of an engineering judgment in the construction materials area is integrally tied to the validity of test data, which is in turn

directly related to training of technical staff, performance of testing equipment, and other elements associated with an accredited engineering laboratory. Therefore, by the standard established by §1001.407, Occupations Code, CMT conducted for the purpose of verification and acceptance of a facility is considered a CME function.

The Board recognizes as a specific exception for CMT conducted under a federally approved quality assurance program (QA) specifically governing the Texas Department of Transportation, provided that alternate methods of ensuring appropriate engineering direct supervision are in place. In addition, CMT services used for a contractor's internal quality control purposes only and are not used by the owner for verification and/or acceptance purposes may not be considered engineering.

Frequently Asked Questions:

1. Can a public entity solicit bids and use a price in the selection screening process for CME services?

No. Under the PSPA, public entities must select CME engineers based on qualifications and demonstrated competence - not price. In fact, engineers cannot provide pricing information in the initial stages of selection without facing possible Board sanctions. However, once the most qualified CME provider is chosen, the public entity may negotiate a fair price for the work. If a price cannot be reached, the public entity may repeat the negotiations with the next most highly qualified provider of services until a contract is reached.

2. Can a public entity solicit bids and use a price in the selection screening process for CMT services?

Yes, but only if the CMT services meet two critical conditions:

The provider's services must be clearly limited to collection of samples and performing tests defined by a professional engineer in the project specifications, and;

The public entity's engineer who is competent in CME must also directly supervise any CMT.

The scope of services on a CMT activity is very narrow. For example, they cannot include engineering supervision services, provision of sealed reports, review and sealing of reports produced by others, or evaluation of test data. Some standard testing cannot be considered CMT because of its engineering components or if there are requirements for an engineer in the test procedure. The following elements are considered engineering and would be subject to the PSPA:

Evaluation of CMT results for an acceptance or rejection decision is engineering.

The testing services are CME when the owner does not provide an engineer for direct supervision of the construction phase.

The testing services are CME when the provider submits the results of their work to the construction contractor for acceptance or rejection.

To ensure proper documentation, the Board recommends that the engineer responsible for receiving CMT results and making acceptance and rejection decisions be identified in project documentation.

3. Many public owners ask construction contractors to provide CME services. The results of the tests are submitted to the public owner. If the contractor elects to provide these services, what rules must be followed?

The contractor must follow the PSPA when acquiring CME under these circumstances. One of the reasons materials testing and engineering are conducted on public projects is to meet the requirements of §1001.407, Occupations Code. This section requires the public owner to ensure that a licensed engineer is directly supervising the engineering construction - including supervision of the acceptance testing. Engineers who are asked to provide CME services for acceptance purposes may not provide prices to the contractor, since the contractor is essentially authorized to fulfill legal requirements as an extension of the owner.

4. What rules must the contractor follow when acquiring CMT services that are strictly for contractor quality control and not for acceptance testing?

This contracting arrangement is most common when tests are being performed in support of contractor quality control in Quality Assurance/Quality Control (QA/QC) contracts. The contractor may utilize price in the initial step of the selection process, and an engineer may provide prices provided there are no engineering services required.

5. Can a private owner use price in the selection process for providers of CMT or CME services?

Yes. There are no restrictions on the use of price, but the Board strongly urges all consumers of engineering services to use demonstrated qualifications and experience to select the service providers.

6. Can a non-engineer provide CME services on a private project?

No. CME is an engineering service and can only be provided by a licensed professional engineer who is a full-time employee of the company offering the services.

TRD-200903972
Dale Beebe Farrow, P.E.
Executive Director
Texas Board of Professional Engineers
Filed: September 10, 2009

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Policy Advisory Opinion Regarding Engineering Aspects of Public Works Facilities Assessments

The Texas Board of Professional Engineers is given authority to issue Advisory Opinions under Subchapter M, Chapter 1001 of the Occupations Code (Texas Engineering Practice Act). The Board is required to issue an advisory opinion about interpretations of the Texas Engineering Practice Act in regard to a specific existing or hypothetical factual situation if requested by a person and to respond to that request within 180 days. Pursuant to that requirement, the Board hereby presents the following final Policy Advisory Opinion Regarding the Engineering Aspects of Public Works Facilities Assessments. The Board, upon a written request to issue a Policy Advisory regarding the engineering aspects of public works facilities assessments, has researched and authored the policy advisory. The Texas Board of Professional Engineers approved the "Policy Advisory Opinion Regarding the Engineering Aspects of Public Works Facilities Assessments" on August 20, 2009 in a public meeting.

Background: This policy advisory request is based on the submitter's review of several Requests for Proposals (RFPs) that included the requirement of cost data on engineering services that were associated with public works projects. The examples submitted had key phrases such as "assessment shall capture... structural, mechanical and electrical conditions..." and "estimate repairs... major structural, major mechanical, etc." The Texas Board of Professional Engineers (Board) agrees that these example activities are considered engineering.

Research: A simple internet search of the phrase "facility assessment" revealed a large variety of consultants and completed assessment projects. Projects varied widely in scope and included everything from information technology projects (internet and phone capability), public usability (does facility perform intended function) to full engineering assessments of structural, mechanical and electrical systems. Consultants included urban planning firms, engineering firms, and

public research and demographics firms. Given the wide variety of projects, both engineering and non-engineering, possible under the "facilities assessment" title, it will be necessary to consider each facility assessment project individually for engineering components that would require qualification based consultant selection.

Engineering Aspects: Facility assessment projects that include any component of engineering and are public works projects must be procured with a qualification based selection process as prescribed in §2254.004 of the Texas Government Code. Engineering services include but are not limited to:

(1) Engineering assessment of the structural integrity or soundness of a building or other structure.

(2) Engineering assessment of the structural integrity of a building foundation and underlying supporting soil.

(3) Engineering assessment of building mechanical and electrical systems.

(4) Engineering assessment of building roof internal drain systems.

Examples of assessments that would not require the services of a professional engineer include:

(1) Assessment of historical significance of structure or facility.

(2) Assessment of building or property's highest and best use.

(3) Assessment of information technology systems in building (telephone and/or internet capacity).

TRD-200903970
Dale Beebe Farrow, P.E.
Executive Director
Texas Board of Professional Engineers
Filed: September 10, 2009

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Policy Advisory Opinion Regarding Procurement of Engineering Services by General Construction Contractors for Governmental Public Works Projects

The Texas Board of Professional Engineers is given authority to issue Advisory Opinions under Subchapter M, Chapter 1001 of the Occupations Code (Texas Engineering Practice Act). The Board is required to issue an advisory opinion about interpretations of the Texas Engineering Practice Act in regard to a specific existing or hypothetical factual situation if requested by a person and to respond to that request within 180 days. Pursuant to that requirement, the Board hereby presents the following final Policy Advisory Opinion Regarding Procurement of Engineering Services by General Construction Contractors for Governmental Public Works Projects. The Board, upon a written request to issue a Policy Advisory regarding procurement of engineering services by general construction contractors for governmental public works projects, has researched and authored the policy advisory. The Texas Board of Professional Engineers approved the "Policy Advisory Opinion Regarding Procurement of Engineering Services by General Construction Contractors for Governmental Public Works Projects" on August 20, 2009 in a public meeting.

Definitions:

Project Professional Engineer--Engineer(s) or engineering firms retained by a governmental entity to perform engineering services for a specific public works project.

General Construction Contractor--Private entity retained by a governmental entity to construct a public works project designed by the Project Professional Engineer.

Other Professional Engineers--Engineer(s) or engineering firms which may be retained by the General Construction Contractor or his subcontractors or vendors to fulfill engineering requirements of the project during the construction phase.

Background: The Dallas - Ft. Worth International Airport Board (DFWIAB) has requested clarification on the Texas Board of Professional Engineers' (Board) interpretation of the Professional Services Procurement Act (PSPA) requirements contained in the Texas Engineering Practice Act (Act). In the course of complex public works projects, the need often arises for Other Professional Engineers to be engaged to perform tasks unforeseen by the Project Professional Engineers or tasks not authorized to be performed by the Project Professional Engineers since they would involve dictating the General Construction Contractor's means and methods of construction. Examples of such engineering tasks include but are not limited to:

(1) Trench safety plans.

(2) Traffic control plans.

(3) Temporary construction structures (crane foundations, for example).

Applicable Board Rules from the Act are 22 TAC §137.53 (relating to Engineer Standards of Compliance with Professional Services Procurement Act) and §137.79 (relating to Standards for Compliance with Professional Services Procurement Act).

Analysis of Board Rules, Texas Administrative Code, Title 22, Part 6, Chapter 137: A reading of Board Rule §137.53 reveals that no language exists specific to the selection of Other Professional Engineers that may be required during the construction phase of the project and that would be selected by a General Construction Contractor. Section 137.53 is specific, however, in that all professional engineers must not divulge cost information prior to being selected solely on their qualifications. The rule also requires licensed professional engineers to report to the Board any instance where a governmental entity and/or their representative requests cost information prior to the qualification based selection phase. The board would interpret a General Construction Contractor to be a representative of the governmental entity. Similarly, Board Rule §137.79 requires that governmental entities or their representatives use qualification based selection processes.

Process: If professional engineering services are required during the course of the project, the public entity or the General Construction Contractor must use qualification based selection to procure all engineering services regardless of when the services are required. The following language is used by the DFWIAB in their contract documents to communicate this requirement to their contractors and representatives:

Ancillary/Integral Professional Services: In selecting an architect, engineer or land surveyor, etc., to provide professional services, if any, that are required by the specifications, bidder shall not do so on the basis of competitive bids but shall make such selection on the basis of demonstrated competence and qualifications to perform the services in the manner provided by §2254.004 of the Texas Government Code and so shall certify to the Board (DFWIAB) with its bid.

The above contract language covers instances where a General Construction Contractor's means and methods would trigger the requirement for Other Professional Engineering services that were not performed by the Project Professional Engineers. Examples include traffic control plans for contractor controlled disruptions of normal traffic, or instances where Other Professional Engineering services would be

sought to build a temporary crane foundation. The General Construction Contractor would use a qualification based selection process to select Other Professional Engineers and would certify in writing to the governmental entity that the QBS process was followed and no pricing or costing data was used in the process.

Limitations: The QBS process performed by General Construction Contractors described in this policy advisory is intended only for those limited instances where:

(1) Engineering decisions or designs performed by the governmental entity's Project Professional Engineer would interfere with the contractor's means and methods of construction or

(2) Unforeseen construction issues necessitate the services of Other Professional Engineers in the course of the project.

TRD-200903971
Dale Beebe Farrow, P.E.
Executive Director
Texas Board of Professional Engineers
Filed: September 10, 2009

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 26, 2009**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 26, 2009**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: Mark Gibbs dba A&W Auto Repair and Used Parts; DOCKET NUMBER: 2009-0787-WQ-E; IDENTIFIER: RN104420849; LOCATION: Victoria, Victoria County; TYPE OF FACILITY: auto repair and used parts; RULE VIOLATED: 30 Texas Administrative Code (TAC) §281.25(a)(4) and 40 Code of Federal Regulations (CFR) §122.26(c), by failing to obtain authorization to discharge storm water associated with industrial activities; PENALTY: $2,140; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(2) COMPANY: BRADY IMPLEMENT COMPANY; DOCKET NUMBER: 2009-0482-MLM-E; IDENTIFIER: RN101649861; LOCATION: Brady, McCulloch County; TYPE OF FACILITY: tractor sales and servicing dealership; RULE VIOLATED: 30 TAC §331.3(a) and §331.7(a) and 40 CFR §144.11, by failing to obtain authorization to operate an underground injection well; 30 TAC §331.10(d) and (e), by failing to submit the appropriate inventory information; and 30 TAC §324.4(1), by failing to prevent the unauthorized discharge of used oil; PENALTY: $3,925; ENFORCEMENT COORDINATOR: Ross Fife, (512) 239-2541; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325)655-9479.

(3) COMPANY: Chevron Phillips Chemical Company, LP; DOCKET NUMBER: 2009-0523-AIR-E; IDENTIFIER: RN100825249; LOCATION: Old Ocean, Brazoria County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(1), Federal Operating Permit (FOP) Number O-02151, General Terms and Conditions (GTC), and Texas Health and Safety Code (THSC), §382.085(b), by failing to submit an annual compliance certification; and 30 TAC §§101.20(1) - (3), 111.111(a)(4)(A), and 116.715(a), New Source Review (NSR) Permit Number 22690/PSD-TX-751M1, Special Condition (SC) Number 6, 40 CFR §60.18(c)(1) and §63.11(b)(4), and THSC, §382.085(b), by failing to prevent visible emissions from flares; PENALTY: $10,370; Supplemental Environmental Project (SEP) offset amount of $4,148 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Clean School Buses; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(4) COMPANY: Claybar Construction, LLP; DOCKET NUMBER: 2009-1423-WQ-E; IDENTIFIER: RN105788178; LOCATION: Orange County; TYPE OF FACILITY: construction company; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a multi-sector general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(5) COMPANY: ConocoPhillips Company; DOCKET NUMBER: 2009-0129-AIR-E; IDENTIFIER: RN102495884; LOCATION: Borger, Hutchinson County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §§101.20(3), 111.111(a)(1), and 116.715(a) and (c)(7), NSR Flexible Air Permit Number 9868A/PSD-TX-102M6, SC Numbers 1 and 23, and THSC, §382.085(b), by failing to comply with permitted emissions limits; 30 TAC §106.533(j)(1)(B) and THSC, §382.085(b), by failing to notify the Amarillo Regional Office prior to initiating remediation activities; 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to have authorization to operate a source of air emissions; 30 TAC §101.20(3) and §116.715(a), NSR Permit Number 9869/PSD-TX-102M6, SC Number 2B, and THSC, §382.085(b), by failing to maintain instrument monitoring of the flare pilot flame; 30 TAC §101.20(3) and §116.715(a), NSR Permit Number 9868A/PSD-TX-102M6, SC Number 2C, and THSC, §382.085(b), by failing to operate flares with no visible emission, except for period not to exceed a total of five minutes during any two consecutive hours; 30 TAC §101.20(3) and §116.715(a), NSR Permit Number 9868A/PSD-TX-102M6, SC Number 10, and THSC, §382.085(b), by failing to operate the sulfur recovery unit (SRU) tail gas incinerator with no visible emissions; 30 TAC §101.20(3) and §116.715(a), NSR Permit Number 9868A/PSD-TX-102M6, SC Number 1, and

THSC, §382.085(b), by failing to operate the SRU thermal reactor at all times with a stable flame and to maintain the flame temperature at not less than 2,000 degrees Fahrenheit; 30 TAC §101.20(3) and §116.715(a), NSR Permit Number 9868A/PSD-TX-102M6, SC Number 14, and THSC, §382.085(b), by failing to maintain the SRU 43 sulfur pit; 30 TAC §101.20(3) and §116.715(a), NSR Permit Number 9868A/PSD-TX-102M6, SC Number 28, and THSC, §382.085(b), by failing to limit the fuel gas used to fire all of the plant's heaters, boilers, and tail gas incinerators; 30 TAC §101.20(3) and §116.715(a) and (c)(7), NSR Permit Number 9868A/PSD-TX-102M6, SC Number 41, and THSC, §382.085(b), by failing to limit ammonia-nitrogen emissions from an engine; 30 TAC §101.20(3) and §116.715(a), NSR Permit Number 9868A/PSD-TX-102M6, SC Number 55, and THSC, §382.085(b), by failing to ensure that a minimum coke moisture content of 6% by weight was maintained during coke handling and storage operations; 30 TAC §101.20(3) and §116.715(a), NSR Permit Number 9868A/PSD-TX-102M6, SC Number 59B, and THSC, §382.085(b), by failing to take samples and perform moisture analyses of coke piles; 30 TAC §101.20(1), 40 CFR §60.102(a)(1), and THSC, §382.085(b), by failing to limit particulate matter emissions; and 30 TAC §§101.20(3), 111.111(a)(1), and 116.715(a) and (c)(7), NSR Permit Number 9868A/PSD-TX-102M6, SC Numbers 1 and 23, and THSC, §382.085(b), by failing to comply with permitted emissions limits; PENALTY: $320,025; SEP offset amount of $128,010 applied to Texas Parent Teacher Association - *Clean School Bus Program*; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(6) COMPANY: Disposal Properties, LLC; DOCKET NUMBER: 2009-0761-IHW-E; IDENTIFIER: RN100622570; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: hazardous waste treatment and storage; RULE VIOLATED: 30 TAC §335.152(a)(3) and 40 CFR §264.54, by failing to keep the fire suppression system operational; and 30 TAC §335.4(2), by failing to maintain the sump in the container storage area; PENALTY: $2,650; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(7) COMPANY: City of Eagle Pass Water Works System; DOCKET NUMBER: 2009-0607-MWD-E; IDENTIFIER: RN102183001; LOCATION: Maverick County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010406002, Permit Conditions Number 2.d., and the Code, §26.121(a), by failing to prevent the unauthorized discharge of wastewater; PENALTY: $24,605; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(8) COMPANY: E. I. du Pont de Nemours and Company; DOCKET NUMBER: 2009-0861-AIR-E; IDENTIFIER: RN100216035; LOCATION: Nederland, Jefferson County; TYPE OF FACILITY: industrial organic chemical plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), FOP Number O-01961, GTC and SC Number 16, Air Permit Number 4351, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $6,075; ENFORCEMENT COORDINATOR: Audra Benoit, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(9) COMPANY: Frognot Water Supply Corporation; DOCKET NUMBER: 2009-1174-PWS-E; IDENTIFIER: RN101193662; LOCATION: Collin County; TYPE OF FACILITY: public water supply (PWS); RULE VIOLATED: 30 TAC §290.45(b)(1)(D)(iv) and THSC, §341.0315(c), by failing to provide emergency power that will deliver water at a rate of 0.35 gallons per minute (gpm) per connection; PENALTY: $262; ENFORCEMENT COORDINATOR: Stephen Thompson, (512) 239-2558; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: Knife River Corporation - South; DOCKET NUMBER: 2009-1006-IWD-E; IDENTIFIER: RN101829992; LOCATION: Bridge City, Orange County; TYPE OF FACILITY: ready-mixed concrete plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES General Permit Number TXG110862, Part III, Permit Requirements, Section A, and the Code, §26.121(a), by failing to comply with permit effluent limits for pH and total suspended solids (TSS); and 30 TAC §305.125(1) and §319.1 and TPDES General Permit Number TXG110862, Part III, Permit Requirements, Section A, by failing to report flow for the monitoring period ending November 30, 2008; PENALTY: $3,827; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(11) COMPANY: LCY ELASTOMERS LP; DOCKET NUMBER: 2009-0853-IWD-E; IDENTIFIER: RN102325974; LOCATION: Harris County; TYPE OF FACILITY: synthetic rubber manufacturing; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0004772000, Effluent Limitations and Monitoring Requirements Numbers 1 and 3, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limits for TSS, flow, and five-day carboneceus biochemical demand; PENALTY: $24,125; SEP offset amount of $9,650 applied to Gulf Coast Waste Disposal Authority - River, Lakes, Bays 'N Bayous Trash Bash; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(12) COMPANY: Libby Water Supply Corporation; DOCKET NUMBER: 2009-1058-PWS-E; IDENTIFIER: RN101458412; LOCATION: Nacogdoches County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.113(f)(4) and THSC, §341.0315(c), by failing to comply with the maximum contaminant level for total trihalomethanes; PENALTY: $367; ENFORCEMENT COORDINATOR: Amanda Henry, (713) 767-3500; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(13) COMPANY: Luella Special Utility District; DOCKET NUMBER: 2009-1175-PWS-E; IDENTIFIER: RN101456937; LOCATION: Sherman, Grayson County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.45(b)(1)(D)(iv) and THSC, §341.0315(c), by failing to provide emergency power that will deliver water at a rate of 0.35 gpm per connection; PENALTY: $280; ENFORCEMENT COORDINATOR: Amanda Henry, (713) 767-3500; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(14) COMPANY: City of Rotan; DOCKET NUMBER: 2009-1176-PWS-E; IDENTIFIER: RN101428282; LOCATION: Rotan, Fisher County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.42(l), by failing to compile a thorough and up-to-date plant operations manual for operator review and reference; 30 TAC §290.46(s)(2)(C)(i), by failing to verify the accuracy of manual disinfectant residual analyzers; 30 TAC §290.44(h)(1)(A), by failing to ensure that a backflow prevention assembly or an air gap is installed at any location where a potential contamination hazard exists; 30 TAC §290.45(b)(1)(D)(iii) and THSC, §341.0315(c), by failing to provide two or more service pumps that have a total capacity of two gpm per connection; and 30 TAC §290.42(m), by failing to maintain an intruder-resistant fence around the north tower elevated storage tank; PENALTY: $2,677; ENFORCEMENT COORDINATOR: Rebecca

Clausewitz, (210) 490-3096; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(15) COMPANY: VICTORIA MOMIN, INC. dba Honey Stop 8; DOCKET NUMBER: 2009-0763-PST-E; IDENTIFIER: RN101444354; LOCATION: Highlands, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.10(b), by failing to maintain underground storage tank (UST) records and make them immediately available for inspection; 30 TAC §334.49(c)(2)(C) and the Code, §26.3475(d), by failing to inspect the impressed current cathodic protection system at least once every 60 days; 30 TAC §334.49(c)(4) and the Code, §26.3475(d), by failing to have the cathodic protection system inspected and tested for operability and adequacy of protection; 30 TAC §334.48(c), by failing to inspect and test the cathodic protection system for operability and adequacy of protection; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor USTs for releases; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records; and 30 TAC §115.246(6) and THSC, §382.085(b), by failing to maintain all required Stage II records at the station and make them immediately available for review; PENALTY: $10,459; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(16) COMPANY: Warren Independent School District; DOCKET NUMBER: 2009-0859-MWD-E; IDENTIFIER: RN101512044; LOCATION: Tyler County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0011307001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permit effluent limits for TSS; PENALTY: $4,400; SEP offset amount of $3,520 applied to RC&D - Clean School Buses; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

TRD-200904043
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 15, 2009

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Notice of District Petition

Notice issued August 28, 2009.

APPLICATION NO. 14-1615B; Charles and Joanna Swift, Applicants, 213 Iron Gate, Victoria, Texas 77904, have applied to sever 15 acre-feet of water per year from the underflow of the Llano River, Colorado River Basin, authorized by Certificate of Adjudication No. 14-1616 and combine that portion with the applicants' water rights on the Llano River authorized by Certificate of Adjudication No. 14-1615 and to change the place of use and diversion point location for the 15 acre-foot portion of water to those authorized by Certificate of Adjudication No. 14-1615. More information on the application and how to participate in the permitting process is given below. The application was received on August 4, 2008. Additional information and fees were received on November 4, 2009. The application was declared administratively complete and accepted for filing on July 30, 2009. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below by September 17, 2009.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement ([I/we] request a contested case hearing); and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200904075
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 16, 2009

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 26, 2009.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 26, 2009.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing.**

(1) COMPANY: AKJ Management, Inc. dba A & B Food Mart; DOCKET NUMBER: 2008-1363-PST-E; TCEQ ID NUMBER: RN101593294; LOCATION: 300 East Moore Avenue, Terrell, Kaufman County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor underground storage tanks (USTs) for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); and 30 TAC §115.221 and Texas Health and Safety Code (THSC), §382.085(b), by failing to install an approved Stage I vapor recovery system; PENALTY: $5,625; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Brenda Lewis; DOCKET NUMBER: 2007-1845-IHW-E; TCEQ ID NUMBER: RN104634472; LOCATION: west side of United States Highway 281, two miles south of Premont, Jim Wells County; TYPE OF FACILITY: property previously used for a crop dusting operation business; RULES VIOLATED: 30 TAC §335.4, by failing to allow, suffer, or permit the disposal of hazardous waste at the site; PENALTY: $1,200; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(3) COMPANY: Central Industrial Park, Ltd.; DOCKET NUMBER: 2007-0969-IHW-E; TCEQ ID NUMBER: RN104621412; LOCATION: at or near 600 - 720 West 6th Street, Houston, Harris County; TYPE OF FACILITY: multiple tracts of land; RULES VIOLATED: TWC, §26.121(a) - (c) and (e), and 30 TAC §335.4, by failing to cause, suffer, allow, or permit the discharge of industrial solid waste into or adjacent to the water in the state; PENALTY: $15,000; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023, (713) 767-3500.

(4) COMPANY: City of Marlin; DOCKET NUMBER: 2005-2035-PWS-E; TCEQ ID NUMBER: RN102886892; LOCATION: 1.7 miles from the intersection of Farm-to-Market Road 147 and Highway 6, immediately south of the dam for Marlin City Lake, Marlin, Falls County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.42(d)(5), (11)(D)(i), (E)(ii), and (v), and AO Docket Number 2003-0215-MLM-E, Ordering Provision Number 3.c.ii., by failing to provide an operational flow measuring device to measure the raw water supplied to the plant, treated water used to backwash the filters, and the backwash lagoon decant water, by failing to provide rate-of-flow controllers with rate-of-flow indicators for each filter unit, and by failing to equip each filter unit with an on-line turbidimeter or a device to indicate loss of head through the filter; 30 TAC §290.46(s)(1), (2)(C)(i) and (ii) and AO Docket Number 2003-0215-MLM-E, Ordering Provision Number 3.a.vi., by failing to properly conduct and record the verification of the accuracy of the manual disinfectant residual analyzer, by failing to calibrate the raw water flow meter, and by failing to calibrate the continuous on-line disinfectant residual analyzer; 30 TAC §290.42(d)(2)(E) and §290.44(d)(1) and (h)(1)(A) and AO Docket Number 2003-0215-MLM-E, Ordering Provision Number 3.a.ii., by failing to provide, at any residence or establishment where an actual or potential contamination hazard exists, additional protection at the meter in the form of an air gap or back-flow prevention assembly, by failing to have properly installed air releases in the distribution system to preclude the possibility of submergence or possible entrance of contaminants, and by failing to provide an air gap on the filter to the waste connection; 30 TAC §290.46(f)(2), by failing to make the water system's operating records available for review during the investigation; 30 TAC §290.109(c)(1)(B), by failing to monitor for microbial contamination at locations specified in the system's monitoring plan; 30 TAC §290.121, by failing to maintain an up-to-date chemical and microbiological monitoring plan; 30 TAC §290.46(e)(6)(C) and AO Docket Number 2003-0215-MLM-E, Ordering Provision Number 3.a.iv., by failing to have at least one Class "C" or higher surface water operator on duty at the plant when it is in operation or failing to provide the plant with continuous turbidity and disinfectant residual monitors with automatic plant shutdown and alarms to summon operators so as to ensure that the water produced continues to meet the commission's drinking water standards during periods when the plant is not staffed; 30 TAC §290.43(e) and §290.46(m), by failing to provide facility security for all potable water storage tanks and pressure maintenance facilities installed in a lockable building designed to prevent intruder access or enclosed by an intruder resistant fence with lockable gates and by failing to maintain plant facilities in a manner to ensure the reliability and general appearance of the system's facilities; 30 TAC §290.43(c)(1) - (4), and AO Docket Number 2003-0215-MLM-E, Ordering Provision Numbers 3.a.x., 3.a.xi., and 3.c.iii., by failing to provide a positive seal when the hatch is closed, by failing to equip vents with an approved screen to prevent entry of animals, birds, insects, and heavy air contaminants, and by failing to design overflows in strict accordance with current American Water Works Association (AWWA) standards terminating with a gravity hinged and weighted cover, having a pressure gauge that is not less than three inches in diameter and calibrated in not more than two foot intervals and providing overflows and other appurtenances as specified in the AWWA standards; 30 TAC §290.46(m)(4), by failing to have all water treatment units, storage and pressure maintenance facilities, distribution system lines and related appurtenances maintained in a watertight condition and free of excessive solids; 30 TAC §290.110(c)(5)(C), by failing to monitor the disinfectant residual at representative locations in the distribution system; 30 TAC §290.41(e)(2)(C), by failing to establish a restricted zone of 200 feet radius from the raw water intake works and all recreational activities; and 30 TAC §290.42(d)(13) and (f)(1)(C), by failing to identify influent, effluent, waste backwash and chemical feed lines by the various use of labels or different colors of paint that shall be placed at intervals of no greater than five feet and by failing to label all chemical day tanks; PENALTY: $43,880; Supplemental Environmental Projects (SEP) offset amount of $43,880 applied to Texas Association of Resource Conservation and Development Areas, Inc., Clean-up of Unauthorized Trash Dumps; STAFF ATTORNEY: Dinniah C. Tadema, Litigation Division, MC 175, (512) 239-0617; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(5) COMPANY: John Kiousis dba Tech Cafe; DOCKET NUMBER: 2008-1560-PWS-E; TCEQ ID NUMBER: RN101453561; LOCATION: 11710 University Avenue, Lubbock, Lubbock County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.42(e)(3), by failing to provide disinfection equipment so that continuous and effective disinfection can be secured under all conditions; 30 TAC §290.41(c)(3)(M), by failing to provide the well with

a suitable sampling cock on the discharge pipe; 30 TAC §290.46(v), by failing to install electrical wiring in compliance with a local or national code; 30 TAC §290.46(f), by failing to keep on file and make available for commission review records of all waterworks operations and maintenance activities; 30 TAC §290.45(d)(2)(A)(ii) and THSC, §341.0315(c), by failing to provide a minimum tank pressure capacity of 220 gallons; 30 TAC §290.46(s) and §290.110(d)(1)(C), by failing to monitor the free chlorine residual within the distribution system using a method that employs a diethyl-p-phenylendiamine colorimeter; 30 TAC §290.41(c)(3)(N), by failing to provide an operable flow measuring device on the well to measure production yields and provide for the accumulation of water production data; and 30 TAC §290.42(c)(3)(O), by failing to provide an enclosed, locked, ventilated well house to exclude possible contamination or damage to the facilities by trespassers; PENALTY: $3,484; STAFF ATTORNEY: Tommy Tucker Henson II, Litigation Division, MC 175, (512) 239-0946; REGIONAL OFFICE: Lubbock Regional Office, 5012 50th Street, Suite 100, Lubbock, Texas 79414-3520, (806) 796-7092.

(6) COMPANY: NN Business, Inc.; DOCKET NUMBER: 2008-1892-PST-E; TCEQ ID NUMBER: RN102357464; LOCATION: 2214 Leopard Street, Corpus Christi, Nueces County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the UST system; 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); 30 TAC §334.50(d)(1)(B)(ii) and TWC, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records at least once each month, sufficiently accurate to detect a release which equals or exceeds the sum of 1% of the total substance flowthrough for the month, plus 130 gallons; 30 TAC §334.50(d)(1)(B)(iii)(I) and TWC, §26.3475(c)(1), by failing to record inventory volume measurements for regulated substance inputs, withdrawals, and the amounts still remaining in the tanks each operating day; and 30 TAC §334.49(c)(4) and TWC, §26.3475(d), by failing to have the cathodic protection system inspected and tested for operability and adequacy of protection at a frequency of at least once every three years; PENALTY: $6,676; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(7) COMPANY: R. F. Horka; DOCKET NUMBER: 2008-0205-MLM-E; TCEQ ID NUMBER: RN105388854; LOCATION: 2204 Highway 96 South, Silsbee, Hardin County; TYPE OF FACILITY: real property; RULES VIOLATED: 30 TAC §101.4 and §111.201 and THSC, §382.085(b), by failing to prevent nuisance conditions; and 30 TAC §330.15(c), by failing to properly store and dispose of municipal solid waste; PENALTY: $8,500; STAFF ATTORNEY: Tommy Tucker Henson II, Litigation Division, MC 175, (512) 239-0946; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(8) COMPANY: River City Ready Mix, Inc.; DOCKET NUMBER: 2009-0362-WQ-E; TCEQ ID NUMBER: RN104332945; LOCATION: 19485 Marbach Lane, Bracken, Comal County; TYPE OF FACILITY: concrete batch plant and quarry; RULES VIOLATED: 30 TAC §30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to obtain a Storm Water Multi-Sector General Permit to discharge storm water associated with industrial activities; PENALTY: $6,250; STAFF ATTORNEY: Kari Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

TRD-200904057
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 15, 2009

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 26, 2009.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 26, 2009.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Garett Davis; DOCKET NUMBER: 2009-0466-LII-E; TCEQ ID NUMBER: RN105565246; LOCATION: 14029 Timberline Trail, Austin, Travis County; TYPE OF FACILITY: landscape business; RULES VIOLATED: 30 TAC §30.5(b) and §344.30, TWC, §37.003 and Texas Occupations Code §1903.251, by failing to refrain from advertising or representing himself to the public as a person who can perform services for which a license or registration is required when not possessing a current license or registration; PENALTY: $262; STAFF ATTORNEY: Sharesa Y. Alexander, Litigation Division, MC 175, (512) 239-3503; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(2) COMPANY: Javier Godoy; DOCKET NUMBER: 2009-0265-LII-E; TCEQ ID NUMBER: RN103365946; LOCATION: 4324 Silverwood Trail, Keller, Tarrant County; TYPE OF FACILITY: licensed irrigator; RULES VIOLATED: 30 TAC §344.71(a) and (b), by failing to

include the licensed irrigator name, license number, and the required TCEQ language, on all written contracts, estimates, proposals, bids, and invoices relating to the installation or repair of an irrigation system; PENALTY: $131; STAFF ATTORNEY: Sharesa Y. Alexander, Litigation Division, MC 175, (512) 239-3503; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200904056
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 15, 2009

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Notice of Public Hearings on Proposed Revisions to 30 TAC Chapters 101 and 122, to the State Implementation Plan and Notification of the Withdrawal of the Texas State Plan for Mercury

The Texas Commission on Environmental Quality (commission) will conduct public hearings to receive testimony regarding proposed revisions to 30 TAC Chapter 101, General Air Quality Rules, §§101.502, 101.504, and 101.506, and the repeal of §101.601 and §101.602. The commission also proposes amendments to §§122.10, 122.12, and 122.120 and the repeal of §§122.440, 122.442, 122.444, 122.446, and 122.448 of 30 TAC Chapter 122, Federal Operating Permits Program, and corresponding revisions to the state implementation plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102, of the United States Environmental Protection Agency (EPA) concerning state implementation plans.

The proposed amendments incorporate federal changes to the Clean Air Interstate Rule (CAIR) and fulfills the requirements of Senate Bill 1672, 80th Texas Legislature, 2007, by revising the minimum number of years from seven to nine averaging the three highest years from the first five control periods. The proposed revisions would also shift the initial baseline adjustment from the 2016 to 2018 control period. The proposed rule also removes the reference dates of the federal CAIR rule specified in House Bill 2481, 79th Texas Legislature, 2005, allowing the commission to make subsequent changes as directed by federal rule changes for CAIR. Also, this rulemaking would remove the allocation provisions for untimely state allowance allocation submittals to match the removal of these provisions from the federal CAIR rule. **(Rule Project Number 2007-053-101-EN)**

The commission is proposing to repeal the Clean Air Mercury Rule (CAMR) requirements in Chapter 101, General Air Quality Rules, Subchapter H, Emissions Banking and Trading, Division 8, Clean Air Mercury Rule, §101.601 and §101.602; and amend §§122.10, 122.12, and 122.120 and repeal §§122.440, 122.442, 122.444, 122.446, and 122.448 of Chapter 122, Federal Operating Permits Program. The commission is also proposing a letter to the EPA that would withdraw the CAMR State Plan from consideration because the federal rule has been vacated. **(Rule Project Number 2007-054-101-EN)**

The proposed SIP revision would implement revisions of the federal CAIR rule and Senate Bill 1672 of the 80th Texas Legislature, Regular Session in 2007. The proposed revisions incorporate federal changes to the CAIR program; methodology for allocation of CAIR nitrogen oxides allowances as specified by Senate Bill 1672; and non-substantive administrative changes. **(Project Number 2007-051-SIP-NR)**

Public hearings will be held in Fort Worth on October 20, 2009, at 2:00 p.m. at the Texas Commission on Environmental Quality Regional Office, located at 2309 Gravel Drive; in Austin on October 21, 2009, at 2:00 p.m. in Building C, Room 131E at the Texas Commission on Environmental Quality complex, located at the commission's central office located at 12100 Park 35 Circle; and in Houston on October 22, 2009, at 2:00 p.m. in Conference Room A at the Houston-Galveston Area Council, located at 3555 Timmons Lane. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearings. Individuals may present oral statements when called upon in order of registration. A time limit may be established at each hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearings; however, commission staff members will be available to discuss the proposals 30 minutes before each hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

Comments may be submitted to Michael Parrish, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. **All comments should reference the rule or SIP project number that the comment pertains to: Rule Project Number 2007-053-101-EN for the proposed CAIR rule amendments, Rule Project Number 2007-054-101-EN for the proposed repeal of the CAMR rule, SIP Project Number 2007-051-SIP-NR for the proposed CAIR SIP revisions, and 2007-052-SIP-NR for the proposed letter to withdraw the CAMR Texas State Plan from consideration. Comments must be received by October 26, 2009.** Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* Copies of the proposed SIP revision and all appendices can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/implementation/air/sip/sipplans.html.* For further information regarding the proposed rules, please contact Brandon Greulich, Air Quality Planning Section, (512) 239-4904; and regarding the proposed SIP revision, please contact Kim Herndon, Air Quality Planning Section, at (512) 239-1421.

TRD-200903995
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: September 11, 2009

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Notice of Water Quality Applications

The following notices were issued on September 1, 2009 through September 10, 2009.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

GULF COPPER AND MANUFACTURING CORPORATION which operates the Gulf Copper & Dry Dock & Rig Repair, a general fabrica-

tion and repair facility for inland and offshore barges, supply vessels, oil rigs, and other similar vessels, has applied for a major amendment to TPDES Permit No. WQ0000779000 to authorize less stringent effluent limitations for total suspended solids at Outfalls 004 and 005; to remove Outfall 006; and to re-numbered Outfall 007 to Outfall 006. The current permit authorizes the discharge of treated domestic wastewater on a daily average flow not to exceed 16,000 gallons per day via Outfall 001, process wastewater, ballast/void space water and exterior surface low pressure rinse water on an intermittent and flow variable basis via Outfall 004, process wastewater, ballast/void space water and exterior surface low pressure rinse water on an intermittent and flow variable basis via Outfalls 005 and 006, ballast/void space water and exterior surface low pressure rinse water on an intermittent and flow variable basis via Outfall 007. The facility is located on Pelican Island adjacent to Galveston Channel and approximately 1.5 miles east of the Pelican Island Bridge, Galveston County, Texas.

NUCOR CORPORATION which operates Nucor Steel - Jewett Texas, has applied for a renewal of TCEQ Permit No. WQ0001897000, which authorizes the disposal of process wastewater, cooling water and domestic wastewater at a daily average flow not to exceed 13,000 gallons per day into the evaporation ponds; and contact cooling water at an annual average flow not to exceed 103,000 gallons per day used for irrigation. The draft permit authorizes the disposal of process wastewater, cooling water, and domestic wastewater by evaporation, at an annual average flow not to exceed 13,000 gallons per day to the evaporation ponds. This permit will not authorize a discharge of pollutants into water in the State. The facility and land application site are located on the north side of U.S. Highway 79 at a point approximately 1.2 miles west of the intersection of U.S. Highway 79 and Farm-to-Market Road 39 approximately 1.5 miles southeast of the Town of Jewett, Leon County, Texas.

TEXAS MUNICIPAL POWER AGENCY which operates Gibbons Creek Lignite Mine, a surface lignite mine, has applied for a renewal of TPDES Permit No. WQ0002460000, which authorizes the discharge of storm water from sedimentation ponds in active mining areas on an intermittent and flow variable basis via Outfalls 001 and 008. The facility is located along both sides of State Highway 30, approximately 0.5 miles west of the intersection of State Highway 30 and Farm-to-Market Road 244, near the community of Carlos, Grimes County, Texas.

MONARCH UTILITIES I LP 9511 Ranch Road 620 North, Austin, Texas 78726, which operates Oak Trail Shores Water Treatment Plant, has applied for a renewal of TPDES Permit No. WQ0002678000, which authorizes the discharge of electrodialysis reversal unit reject water and filter backwash at a daily average flow not to exceed 160,000 gallons per day via Outfall 001. The facility is located approximately 1.2 miles northwest (via Farm-to-Market Road 2850) of the Town of Thorp Spring, Hood County, Texas 75204.

CITY OF MARFA has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment to TCEQ Permit No. WQ0010109001 to authorize the construction of a new wastewater treatment facility to replace the existing facility. The current permit authorizes the disposal of treated domestic wastewater at an annual average flow not to exceed 120,000 gallons per day via surface irrigation of 62 acres of non-public access grassland (bermuda grass in the warm season and winter rye grass in the cool season). The New wastewater treatment facility and disposal site will be located within the existing facility's easement, approximately 3,000 feet southeast of the intersection of U.S. Highway 90 and U.S. Highway 67 in Presidio County, Texas.

CITY OF EAGLE LAKE has applied for a renewal of TPDES Permit No. WQ0010505001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 750,000 gallons per day. The facility is located approximately 400 feet southeast of the intersection of U.S. Highway 90A bypass and McCarty Avenue, being also 0.5 mile northwest of the intersection of Farm-to-Market Road 102 and U.S. Highway 90A in Colorado County, Texas 77434.

CITY OF ECTOR has applied for a renewal of TPDES Permit No. WQ0010552001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 99,000 gallons per day. The facility is located approximately 4,700 feet north of U.S. Highway 82 and 800 feet west of Farm-to-Market Road 898 in Fannin County, Texas 75439.

CITY OF BROWNFIELD has applied for a renewal of TCEQ Permit No. 10677-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 1,250,000 gallons per day via surface irrigation of 585 acres of non-public access agricultural land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 3,600 feet east and 5,200 feet south of the intersection of U.S. Highway 62 and 2nd Street in the City of Brownfield in Terry County, Texas 79316.

CITY OF LAREDO has applied for a renewal of TPDES Permit No. WQ0010681005, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,000,000 gallons per day. The existing permit authorizes the permittee to dispose of treated wastewater via surface irrigation of non-public access pastureland at a daily average flow not to exceed 63,000 gallons per day in the Interim I phase. The facility is located approximately nine miles north of the intersection of Interstate Highway 35 and Farm-to-Market Road 1472, approximately 3,000 feet east of Interstate Highway 35 and 1,000 feet north of the entrance to the Uniroyal Proving Grounds in Webb County, Texas 78044.

MONTGOMERY COUNTY MUNICIPAL UTILITY DISTRICT NO 8 has applied for a major amendment to TPDES Permit No. WQ0011371001 to authorize relocation of Outfall 002 to the shoreline. The current permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 900,000 gallons per day into the main body of the lake at a point not less than 10 feet below the surface (at normal elevation) and not less than 50 feet from the shoreline. The facility is located at 11609 Walden Road, about 400 feet southeast of the intersection of Walden Road and Poe Drive in the Walden Subdivision, about 5.5 miles east of Montgomery in Montgomery County, Texas 77356.

THE CITY OF BULLARD has applied for a major amendment to TPDES Permit No. WQ0011787001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 213,000 gallons per day to a daily average flow not to exceed 438,000 gallons per day. The facility is located approximately 2,600 feet southwest of the Bullard School and approximately 3,000 feet west-southwest of the intersection of Farm-to-Market Road 344 and Oak Street in Cherokee County, Texas 75757.

BENJAMIN SANJUAN has applied for a renewal of TPDES Permit No. 12919-001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 18,000 gallons per day. The facility is located on the 9800 Block of Deer Trail Drive approximately one mile northwest of the intersection of Farm-to-Market Road 149 and Interstate Highway 45 in Harris County, Texas.

CINCO MUNICIPAL UTILITY DISTRICT NO 1 has applied for a major amendment to TPDES Permit No. WQ0013558001 to authorize an increase in the Total Copper effluent limitations based on the results of the water-effects ratio (WER) study. The current permit includes a more stringent Total Copper effluent limitations. TCEQ received this

application on February 4, 2009. The facility is located approximately 2.0 miles north and 3.25 miles east of the intersection of Farm-to-Market Road 723 and Farm-to-Market Road 1093 in Fort Bend County, Texas 77027.

SOUTH CENTRAL CALHOUN COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO 1 has applied for a renewal of TPDES Permit No. WQ0013774001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 75,000 gallons per day. The facility is located at 1 Wedig Street, 0.8 mile northeast of the intersection of State Highway 316 and Farm-to-Market Road 2760 on the south corner of the intersection of Blackburn Avenue Bay/Chocolate Bay in Calhoun County, Texas 77979.

THE CITY OF ALVORD has applied for a renewal of TPDES Permit No. WQ0014339001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 112,000 gallons per day. The facility is located approximately 2,500 feet south of Farm-to-Market Road 1655 adjacent to Elm Creek at a point approximately 1/2 mile southwest of the business district of the City of Alvord in Wise County, Texas 76225.

CITY OF DRIPPING SPRINGS has applied for a renewal of TCEQ Permit No. WQ0014488001, which authorizes the disposal of treated domestic wastewater effluent at a daily average flow not to exceed 162,500 gallons per day via subsurface drip irrigation of 37.43 acres of pastureland and athletic fields in the Final Phase. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and onsite disposal areas are located approximately 0.55 mile east of the intersection of Ranch Road 12 and Farm-to-Market Road 150, as measured along Farm-to-Market Road 150, and, from that point, approximately 1,110 feet south of Farm-to-Market Road 150 in Hays County, Texas. The offsite disposal area will be located approximately 0.44 mile south of the intersection of U.S. Highway 290 and Ranch Road 12, as measured along Ranch Road 12, and, from that point, approximately 1,280 feet east of Ranch Road 12 in Hays County, Texas.

130 CACTUS INVESTMENT LP has applied for a renewal of TPDES Permit No. WQ0014548001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 950,000 gallons per day. The facility will be located on a 20-acre tract on the south side of Jesse Bohls Road, 7,000 feet east of the Weiss lane intersection in Travis County, Texas 78660.

WHITESTONE HOUSTON LAND LTD has applied for a renewal of TPDES Permit No. WQ0014559001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 900,000 gallons per day. The facility will be located approximately 3,800 feet south of the intersection of Roman Forest Boulevard and U. S. Highway 59 in Montgomery County, Texas 77357.

CNT/KCS ROSENBERG JV LLC has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014948001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The facility will be located on Doris Road, approximately 1,300 feet north of the U.S. Highway 59 southbound right-of-way in Fort Bend County, Texas 77417.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200904073

LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 16, 2009

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Notice of Water Rights Applications

Notice issued August 20 through September 2, 2009.

TCEQ Internal Control No. 05052009-D04; Cape Royale Utility District of San Jacinto County (the "District") has applied to the Texas Commission on Environmental Quality (TCEQ) for authority to adopt and impose an annual non-uniform operation and maintenance standby fee in the maximum amount allowable under the provisions of the Texas Water Code and applicable Commission Rules for calendar years 2009-2011, on unimproved property within the District. The application was filed pursuant to Chapter 49 of the Texas Water Code, 30 Texas Administrative Code Chapter 293, and the procedural rules of the TCEQ. The TCEQ may approve the standby fee as requested, or it may approve a lower standby fee, but it shall not approve a standby fee greater than the amount requested. The standby fee is a personal obligation of the person owning the undeveloped property on January 1 of the year for which the fee is assessed. A person is not relieved of his pro-rated share of the standby fee obligation on transfer of title to the property. On January 1 of each year, a lien is attached to the undeveloped property to secure payment of any standby fee imposed and the interest or penalty, if any, on the fee. The lien has the same priority as a lien for taxes of the District. The purpose of standby fees is to distribute a fair portion of the cost burden for operation and maintenance costs of District facilities to owners of property who have not constructed vertical improvements but have water, wastewater, or drainage facilities or services available. Any revenues collected from the operation and maintenance standby fee shall be used to supplement the District's operation and maintenance account.

TCEQ Internal Control No. 06292009-D02; Bethany Water Supply Corporation (Petitioner) has filed a petition with the Texas Commission on Environmental Quality (TCEQ) to convert Bethany Water Supply Corporation to Bethany Special Utility District (District) and transfer Certificate of Convenience and Necessity (CCN) No. 11051 from Bethany Water Supply Corporation to Bethany Special Utility District. Bethany Special Utility District's business address will be: 133 S. CR 810 Alvarado, Texas 76009. The petition was filed pursuant to Chapters 13 and 65 of the Texas Water Code; 30 Texas Administrative Code Chapters 291 and 293; and the procedural rules of the TCEQ. The nature and purpose of the petition are for the conversion of Bethany Water Supply Corporation and the organization, creation and establishment of Bethany Special Utility District under the provisions of Article XVI, Section 59, Texas Constitution, and Chapter 65 of the Texas Water Code, as amended. The District shall have the purposes and powers provided in Chapter 65 of the Texas Water Code, and CCN No. 11051 shall be transferred as provided in Chapter 13, of the Texas Water Code, as amended. The nature of the services presently performed by Bethany Water Supply Corporation is to purchase, own, hold, lease, and otherwise acquire sources of water supply; to build, operate and maintain facilities for the transportation of water; and to sell water to individual members, towns, cities, private businesses, and other political subdivisions of the State. The nature of the services proposed to be provided by Bethany Special Utility District is to purchase, own, hold, lease, and otherwise acquire sources of water supply; to build, operate, and maintain facilities for the storage, treatment, and transportation of water; and to sell water to individuals, towns, cities, private business entities, and other political subdivisions of the State. Additionally, it is proposed that the District will protect, preserve and restore the purity

and sanitary condition of the water within the District. It is anticipated that conversion will have no adverse effects on the rates and services provided to the customers.

TCEQ Internal Control No. 08172009-D01; Brad Galo, Chief Executive Officer of Galo Inc., general partner of ABG Enterprises, Ltd, general partner of Laredo WO, Ltd. (Petitioner), filed a petition for creation of Williamson County Municipal Utility District No. 25 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to article XVI, section 59 of the Texas Constitution; chapters 49 and 54 of the Texas Water Code; title 30, chapter 293 of the Texas Administrative Code; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the owner of a majority in value of the land, consisting of one tract, to be included in the proposed District; (2) there is one lienholder, Hillcrest Bank, a Kansas banking association, on the property to be included in the proposed District; (3) the proposed District will contain approximately 249.721 acres located in Williamson County, Texas; and (4) the proposed District is within the corporate limits of the City of Georgetown. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project and from the information available at the time, the cost of the project is estimated to be approximately $27,305,000.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at (512) 239-4691. Si desea información en Español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200904074
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 16, 2009

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Texas Facilities Commission

Request for Proposals #303-0-10138

The Texas Facilities Commission (TFC), on behalf of the Office of the Attorney General (OAG), announces the issuance of Request for Proposals (RFP) #303-0-10138. TFC seeks a 5 year lease of approximately 10,626 square feet of office space in San Antonio, Bexar, Texas.

The deadline for questions is October 16, 2009 and the deadline for proposals is October 27, 2009 at 3:00 p.m. The award date is December 16, 2009. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=85071.*

TRD-200904066
Kay Molina
General Counsel
Texas Facilities Commission
Filed: September 16, 2009

♦ ♦ ♦

Request for Proposals #303-0-10199

The Texas Facilities Commission (TFC), on behalf of the Texas Parks and Wildlife Department (TPWD), announces the issuance of Request for Proposals (RFP) #303-0-10199. TFC seeks a five (5) or ten (10) year lease of approximately 3,600 square feet of office/storage/garage space in Matagorda County, Texas.

The deadline for questions is September 30, 2009, and the deadline for proposals is October 9, 2009, at 3:00 p.m. The award date is November 20, 2009. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=84994.*

TRD-200904028
Kay Molina
General Counsel
Texas Facilities Commission
Filed: September 14, 2009

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Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission announces its intent to submit amendments to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendments are effective October 1, 2009.

The amendments will modify the reimbursement methodologies in the Texas Medicaid State Plan as a result of Medicaid fee changes for the following services:

Physicians and Certain Other Practitioners; and

Durable Medical Equipment

The proposed amendments are estimated to result in an additional annual aggregate expenditure of $17,784,701 for federal fiscal year (FFY) 2010, with approximately $12,139,837 in federal funds and $5,644,864 in State General Revenue (GR). For FFY 2011, the estimated additional aggregate expenditure is $18,433,475, with approximately $11,227,829 in federal funds and $7,205,646 in GR.

Interested parties may obtain copies of the proposed amendments by contacting Dan Huggins, Director of Rate Analysis for Acute Care Services, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1432; by facsimile at (512) 491-1998; or by e-mail at dan.huggins@hhsc.state.tx.us. Copies of the proposals will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200903969
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: September 9, 2009

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 09-029, Amendment Number 875, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The purpose of this amendment is to provide for higher levels of managed care savings in the Program for All-Inclusive Care for the Elderly (PACE). The amendment also provides clarification that actuarial adjustments may be made to the rates as needed, and that other data sources may be considered as deemed necessary. The proposed amendment is effective October 1, 2009.

The proposed amendment is estimated to result a cost savings of $2,239,278 for the remainder of federal fiscal year (FFY) 2010, consisting of $1,528,532 cost savings in federal funds and $710,747 cost savings in state general revenue. For FFY 2011, the estimated cost savings is $2,261,671 consisting of $1,377,584 cost savings in federal funds and $884,087 cost savings in state general revenue.

To obtain copies of the proposed amendment, interested parties may contact William Warburton by mail at HHSC Actuarial Analysis Department, P.O. Box 85200, Mail Code H-400, Austin, TX 78708-5200; by telephone at (512) 491-1365; by facsimile at (512) 491-1998; or by e-mail at william.warburton@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200904071
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: September 16, 2009

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Texas Department of Housing and Community Affairs

Notice of Public Comment Period and Public Hearing Schedule for Consolidated Plan and Rules

ANNOUNCEMENT OF THE TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS PUBLIC COMMENT PERIOD AND PUBLIC HEARINGS SCHEDULE FOR COMMENT ON THE: 2010-2014 State of Texas Consolidated Plan, 2010 Multifamily Housing Revenue Bond Rule, 2010 Housing Tax Credit Program Qualified Allocation Plan and Rules, 2010 Real Estate Analysis Rules, 2010 Compliance Monitoring Rules, 2010 Regional Allocation Formula, and 2010 Affordable Housing Needs Score.

The Texas Department of Housing and Community Affairs (TDHCA) announces the opening of a 38-day public comment period for the *2010-2014 State of Texas Consolidated Plan (Plan), 2010 Multifamily Housing Revenue Bond Rule, 2010 Housing Tax Credit Program Qualified Allocation Plan and Rules, 2010 Real Estate Analysis Rules, 2010 Compliance Monitoring Rules, 2010 Regional Allocation Formula, and 2010 Affordable Housing Needs Score*. The 38-day public comment period for the Plan and Rules begins September 18, 2009 and continues until 5:00 p.m. on October 26, 2009.

The Plan is required as part of the overall requirements governing the State's consolidated planning process and the public comment period on the Plan is required by the U.S. Department of Housing and Urban Development (HUD). The Plan is submitted in compliance with 24 CFR §91.520, Consolidated Plan Submissions for Community Planning and Development Programs. TDHCA coordinates the preparation of the Plan with the Texas Department of Rural Affairs (TDRA) and the Department of State Health Services (DSHS). The Plan covers the State's administration of the Community Development Block Grant Program by TDRA, the Housing Opportunities for Persons with AIDS Program by DSHS, and the Emergency Shelter Grants Program and the HOME Investment Partnerships Program by TDHCA.

TDHCA also announces the public hearing schedule for the *Draft 2010-2014 State of Texas Consolidated Plan, 2010 Multifamily Housing Revenue Bond Rule, 2010 Housing Tax Credit Program Qualified Allocation Plan and Rules, 2010 Real Estate Analysis Rules, 2010 Compliance Monitoring Rules, 2010 Regional Allocation Formula, and 2010 Affordable Housing Needs Score.* These hearings were consolidated to provide the public with an opportunity to more effectively provide comment on the Department's policy and planning documents and a variety of its programs. Department-wide hearings will be held at the following times and locations:

September 28, 2009 (Monday)

11:30 a.m.

DALLAS

J. Erik Jonsson Central Library

Dallas Rooms

1515 Young Street

Dallas, TX 75201

(214) 670-1400

September 30, 2009 (Wednesday)

12:30p.m.

HOUSTON

Houston City Hall Annex Chambers

901 Bagby

Houston, TX 77002

(915) 657-4241

October 1, 2009 (Thursday)

5:30 p.m.

EL PASO

City Council Chambers, 2nd Floor

2 Civic Center Plaza

El Paso, TX 79901

(915) 541-4000

October 7, 2009 (Wednesday)

3:00 p.m.

HARLINGEN

Harlingen Public Library

410 76 Drive

Harlingen, TX 78550

(956) 216-5888

October 9, 2009 (Friday)

11:00 a.m.

LUBBOCK

South Plains Association of Governments

1323 58th Street

Lubbock, TX 79412

(806) 762-8721

October 12, 2009 (Monday)

9:30 a.m.

AUSTIN

Thompson Conference Center

4505 Robert Dedman Dr.

Room 2.102

Austin, TX 78712

(512) 471-3121

Individuals who require auxiliary aids or services should contact Gina Esteves, ADA Responsible Employee, at least two days before the scheduled hearing, at (512) 475-3943, or Relay Texas at 1-800-735-2989, so that appropriate arrangements can be made.

Beginning September 18, 2009, the Plan and Rules will be available on the Department's website at www.tdhca.state.tx.us. A hard copy can be requested by contacting the Housing Resource Center via mail at Texas Department of Housing and Community Affairs, Housing Resource Center, P.O. Box 13941, Austin TX 78711-3941, or phone at (512) 475-3976, or email at info@tdhca.state.tx.us.

Public comment on the Rules may also be provided in writing via mail at TDHCA, 2010 Rule Comments, P.O. Box 13941, Austin, TX 78711-3941, or fax at (512) 475-3978, or email at tdhcarulecomments@tdhca.state.tx.us. Public comment on the 2010-2014 State of Texas Consolidated Plan, 2010 Affordable Housing Needs Score, and 2010 Regional Allocation Formula may be provided in writing via mail at Elizabeth Yevich, TDHCA, P.O. Box 13941, Austin, TX 78711-3941, or fax at (512) 469-9606 or email at elizabeth.yevich@tdhca.state.tx.us.

TRD-200904062

Michael Gerber

Executive Director

Texas Department of Housing and Community Affairs

Filed: September 16, 2009

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Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on September 10, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Cebridge Acquisition, L.P. d/b/a Suddenlink Communications for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 37449 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at (800) 735-2989. All inquiries should reference Project Number 37449.

TRD-200904045

Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

Filed: September 15, 2009

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on September 10, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Cable One, Inc. for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 37450 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at (800) 735-2989. All inquiries should reference Project Number 37450.

TRD-200904046

Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

Filed: September 15, 2009

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on September 10, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Cable One, Inc. for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 37451 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at (800) 735-2989. All inquiries should reference Project Number 37451.

TRD-200904047
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 15, 2009

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on September 11, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 37453 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at (800) 735-2989. All inquiries should reference Project Number 37453.

TRD-200904048
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 15, 2009

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On September 4, 2009, Intrado Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60317. Applicant intends to transfer its SPCOA to its wholly-owned subsidiary, Intrado Communications Inc., and to change its name to Intrado Communications Inc.

The Application: Application of Intrado Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 37441.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 30, 2009. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 37441.

TRD-200903984
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 10, 2009

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on September 11, 2009, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Mesa Broadband LLC for a Service Provider Certificate of Operating Authority, Docket Number 37456 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, long distance, and wireless services.

Applicant's requested SPCOA geographic area includes the entire State of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 30, 2009. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 37456.

TRD-200904049
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 15, 2009

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on September 9, 2009, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Cincinnati Bell Any Distance, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 37446 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, Optical Services, T1-Private Line, Fractional T1, and long distance services.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326,

Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 30, 2009. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936- 7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 37446.

TRD-200904070
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 16, 2009

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Notice of Petition for Expanded Local Calling Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of a petition on August 5, 2009, for expanded local calling service (ELCS), pursuant to Chapter 55, Subchapter C of the Public Utility Regulatory Act (PURA).

Project Title and Number: Petition for Expanded Local Calling Service from the San Isidro Exchange to the Exchanges of Rio Grande City, McAllen, Edinburgh, and Mission; Project Number 37336.

The petitioners in the San Isidro exchange request ELCS to the exchanges of Rio Grande City, McAllen, Edinburg, and Mission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than October 9, 2009. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2789. All comments should reference Project Number 37336.

TRD-200904044
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 15, 2009

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Public Notice of Workshop and Request for Comments

The staff of the Public Utility Commission of Texas (commission) will hold a workshop to discuss issues related to the Commission's present protections for disconnections and issues raised in previous proceedings related to disconnections, on November 20, 2009, at 9:30 a.m., in the Commissioners' Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 36131, *Rulemaking Relating to Disconnection of Electric Service and Deferred Payment Plans* has been established for this proceeding. Prior to the workshop, the commission requests interested persons file comments to the following questions:

1. Are early termination fees appropriate for all product offerings, including pre-pay and variable products? If so, should there be a cap on early termination fees?

a. Should early termination fees be pro-rated or waived during the months of June through September for low income, disabled and elderly customers? If so, should there be any prerequisites or limitations?

b. Should early termination fees be prorated for all products over the life span over the term of the contract? For instance, should the termination fee for a cancellation after three months be different than a cancellation after 10 months?

2. Should the commission adopt a standardized definition applicable to all REPs for levelized billing options, including requirements for customer qualification?

3. Should the commission adopt changes to the requirements for levelized billing options?

a. Should the commission adopt best practices or minimum standards for a true-up cycle?

b. If so, how long between intervals is appropriate? (such as quarterly, semiannually, or annually)?

c. Should the average be a rolling average?

4. Should the standard for qualifying for a deferral plan be different from the current standard?

a. Should the time of the deferral and standards be different only during the months of June through September?

5. What effect should a late payment have on a person's ability to qualify for a deferral plan and what effect should a late payment have on the ability to continue to pay under a current deferral plan?

6. Should deferred payment plans offered to customers be extended to 5 months?

7. Should customers on deferred payment plans be prevented from switching to another REP before fulfilling the obligations of the deferred payment plan?

8. Should there be restrictions on customers that fail to satisfy obligations of deferred payment plans? For instance, if customers are unable to satisfy their obligations under a deferred payment plan in the previous year, should they be excluded from a deferred payment plan in the following year?

9. Are any improvements needed in the administration of the LITE-UP program? Should REPs be required to increase the number of bill inserts provided to customers for the program?

10. What improvements are needed regarding critical care customers and ill and disabled?

a. Should a standard definition for critical care and ill and disabled across TDUs and REPs be applied?

b. Once deemed critical care, should a customer have to re-apply for critical care status annually?

c. Are there certain medical conditions that should qualify for critical care status automatically, provided a note from a physician is provided on behalf of the customer?

11. How can education efforts be modified regarding the designation of critical care customers?

Responses may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 within 30 days of the date of publication of this notice. All responses should reference Project Number 36131. The commission requests comments submitted be limited to no more than 20 pages.

Ten days prior to the workshop the commission shall make available in Central Records under Project Number 36131, an agenda for the format of the workshop.

Questions concerning the workshop or this notice should be referred to Christine Wright, Competitive Markets Division, (512) 936-7376. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200904080
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 16, 2009

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South East Texas Regional Planning Commission

Request for Qualifications

South East Texas Regional Planning Commission (SETRPC) is serving as the administrator for the Orange Regional Home Consortium (ORHC), where the City of Orange serves as the responsible entity for the Counties of Hardin, Liberty, Orange, and unincorporated areas of Jefferson County. The ORHC provides a variety of grant-funded programs all aimed at providing safe, decent, and affordable housing to low income families. Under HUD guidelines, ORHC funds are reserved for people at or below 80% of the average median family income for the respective area in which they live and are available through two basic housing/need programs: Rental Housing and/or Community Housing Development (CHDO).

Consulting services will consist of the following tasks:

1. Consultant will provide ongoing technical services to the ORHC on an on-demand basis. Technical services shall include up to three site visits during the term of the contract.

2. Consultant will provide one-day training to ORHC housing staff and such other persons as may be required. The training content shall be determined by the parties as least six weeks in advance of the proposed training to meet the needs of the Consortium.

Contact: David Dean, Contract Specialist, SETRPC, 2210 Eastex Freeway, Beaumont, Texas 77703, ddean@setrpc.org, (409) 899-8444, ext. 6303.

Closing Dates: If your company is interested and qualified to provide professional services to the ORHC, please send your proposal to David Dean via letter or e-mail. Proposals will, at a minimum, need to include your company's qualifications and resume(s) and are due by 12:00 noon, CST on Friday, October 9, 2009.

Shaun P. Davis

Executive Director

South East Texas Regional Planning Commission

TRD-200904060
Mike Foster
Housing Manager
South East Texas Regional Planning Commission
Filed: September 15, 2009

♦ ♦ ♦

Supreme Court of Texas

Order Adopting Amendments to Texas Rules of Disciplinary Procedure 2.16 and 6.08

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 09-9150

ORDER ADOPTING AMENDMENTS TO TEXAS RULES OF DISCIPLINARY PROCEDURE 2.16 AND 6.08

ORDERED that:

1. Texas Rules of Disciplinary Procedure 2.16 and 6.08 are amended as follows.

2. These changes, with any modifications made after public comments are received, take effect January 1, 2010. Comments may be submitted to the Court in writing on or before November 30, 2009. Comments should be directed to Kennon L. Peterson, Rules Attorney, at P.O. Box 12248, Austin TX 78711, or kennon.peterson@courts.state.tx.us.

3. The Clerk is directed to:

a. file a copy of this Order with the Secretary of State;

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal;* and

c. cause a copy of this Order to be posted on the website of the Supreme Court of Texas at http://www.supreme.courts.state.tx.us.

In Chambers, this _____ day of September, 2009.

Wallace B. Jefferson, Chief Justice

_____

Nathan L. Hecht, Justice

_____

Harriet O'Neill, Justice

_____

Dale Wainwright, Justice

_____

David M. Medina, Justice

_____

Paul W. Green, Justice

_____

Phil Johnson, Justice

_____

Don R. Willett, Justice

_____

TEXAS RULES OF DISCIPLINARY PROCEDURE

2.16. Confidentiality

A. ~~Disciplinary Proceedings are strictly confidential and not subject to disclosure, except by court order or as otherwise provided in this Rule 2.16.~~ All members and staff of the Office of Chief Disciplinary Counsel, Board of Disciplinary Appeals, Committees, and Commission shall maintain as confidential all Disciplinary Proceedings and associated records, except that:

1. the pendency, subject matter, status of an investigation, and final disposition, if any, may be disclosed by the Office of Chief Disciplinary Counsel or Board of Disciplinary Appeals if the Respondent has waived confidentiality, the Disciplinary Proceeding is based on conviction of a serious crime, or disclosure is ordered by a court of competent jurisdiction;

2. if the Evidentiary Panel finds that professional misconduct occurred and imposes any sanction other than a private reprimand,

a. the Evidentiary Panel's final judgment is a public record from the date the judgment is signed; and

b. once all appeals, if any, have been exhausted and the judgment is final, the Office of Chief Disciplinary Counsel shall, upon request, dis-

close all documents, statements, and other information relating to the Disciplinary Proceeding that came to the attention of the Evidentiary Panel during the Disciplinary Proceeding;

3. the record in any appeal to the Board of Disciplinary Appeals from an Evidentiary Panel's final judgment, other than an appeal from a judgment of private reprimand, is a public record; and

4. facts and evidence that are discoverable elsewhere are not made confidential merely because they are discussed or introduced in the course of a Disciplinary Proceeding.

~~B. The pendency, subject matter and status of a Disciplinary Proceeding may be disclosed by Complainant, Respondent or Chief Disciplinary Counsel if the Respondent has waived confidentiality or the Disciplinary Proceeding is based upon a conviction for a serious crime.~~

~~C. While Disciplinary Proceedings are confidential, facts and evidence that are discoverable elsewhere are not made confidential merely because they are discussed or introduced in the course of a disciplinary proceeding.~~

B.~~D.~~ The deliberations and voting of an Evidentiary Panel are strictly confidential and not subject to discovery. No person is competent to testify as to such deliberations and voting.

~~E. If the Evidentiary Panel finds that professional misconduct has occurred and imposes any sanction other than a private reprimand, all information, documents, statements and other information coming to the attention of the Evidentiary Panel shall be, upon request, made public. However, the Chief Disciplinary Counsel may not disclose work product or privileged attorney-client communications without the consent of the client.~~

C. Rule 6.08 governs the provision of confidential information to authorized agencies investigating qualifications for admission to practice, attorney discipline enforcement agencies, law enforcement agencies, the State Bar's Client Security Fund, the State Bar's Lawyer Assistance Program, the Supreme Court's Unauthorized Practice of Law Committee, and the Commission on Judicial Conduct.

6.08. Access to Confidential Information

No officer ~~(except the General Counsel when acting in the capacity of Chief Disciplinary Counsel)~~ or Director of the State Bar or any appointed adviser to the Commission shall have access to any confidential ~~records,~~ information ~~or proceedings~~ relating to any Disciplinary Proceeding, Disciplinary Action, or Disability suspension. The Office of Chief Disciplinary Counsel may provide ~~appropriate~~ this information to authorized agencies investigating qualifications for admission to practice, attorney discipline enforcement agencies, law enforcement agencies, the State Bar's Client Security Fund, the State Bar's Lawyer Assistance Program, ~~the Commission on Judicial Conduct and~~ the Supreme Court's Unauthorized Practice of Law Committee ~~and its subcommittees~~, and the Commission on Judicial Conduct.

TRD-200904041
Kennon Peterson
Rules Attorney
Supreme Court of Texas
Filed: September 14, 2009

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Texas Department of Transportation

Aviation Division - Request for Proposal for Aviation Engineering Services

Ochiltree County and the City of Perryton, through their agent, the Texas Department of Transportation (TxDOT), intend to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is a listing of proposed projects at the Perryton Ochiltree County Airport during the course of the next five years through multiple grants.

Current Project: Ochiltree County/City of Perryton. TxDOT CSJ No.0904PERRY. Rehabilitate and mark TW A, TW B, TW C, and TW D; rehabilitate hangar access TWs and south apron, and reconstruct north apron.

The DBE/HUB goal for the current project is 7%. TxDOT Project Manager is Russell Deason.

Future scope work items for engineering/design services within the next five years may include but are not necessarily limited to the following:

1. Rehabilitate north public and RW 17-35
2. Rehabilitate and mark RW 17-35
3. Rehabilitate parallel TW to RW 17-35
4. Relocate county road for crosswind RW 4-22 extension
5. Construct crosswind RW 4-22
6. Construct parallel TW to RW 4-22
7. Install TW reflectors cylinder type parallel TW to RW 4-22

Ochiltree County and the City of Perryton reserve the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, project narrative, and most recent Airport Layout Plan are available online at www.txdot.gov/avn/avninfo/notice/consult/index.htm by selecting Perryton Ochiltree County Airport. The proposal should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at http://www.txdot.gov/business/projects/aviation.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. A prime provider may only submit one proposal. If a prime provider submits more than one proposal, that provider will be disqualified. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Seven completed, unfolded copies of Form AVN-550 must be received by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than October 20, 2009 before 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Becky Vick.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluation of engineering proposals can be found at http://www.txdot.gov/business/projects/aviation.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Becky Vick. For technical questions, please contact Russell Deason, Project Manager.

TRD-200904037
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 14, 2009

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Public Notice: Request for Input on Authorization of the Surface Transportation Program

The Texas Department of Transportation (department) is soliciting public comments regarding authorization of a new federal surface transportation program.

In the near future, Texas will face severe funding shortfalls in addressing the state's existing and planned highway system. Funding to the department comes from several sources including: state motor fuels taxes, state motor vehicle registration fees, the issuance of bonds, and federal reimbursements. Federal reimbursements come to the state as a percentage of what Texas pays in federal motor fuels taxes. Federal funding is apportioned to states through periodic Congressional authorizations of the surface transportation program. The most recent multi-year federal authorization program expires on September 30, 2009. It is anticipated that the actual legislation authorizing the program will not pass until several months after that deadline. Congress will be working to identify the transportation policies and funding levels that Texas will operate within during what will likely be the next several-year authorization period. Many of these concepts and proposals may be found in draft legislation proposed by Chairman James Oberstar (MN) and can be found at the following link on the U.S. House of Representatives' Transportation and Infrastructure Committee website at:

http://transportation.house.gov/Media/file/Highways/HPP/OBERST_044_xml.pdf.

The department and the Texas Transportation Commission are seeking public input and comment on the transportation, project delivery, and funding policies that individual citizens and interested parties of this state believe to be an important part of authorization of the surface transportation program. The department is seeking both general ideas as well as specific recommendations. The information gathered through this process will assist the department in informing members of Congress on the issues of importance to Texas for authorization of a new surface transportation program.

The department will accept only written comments and they should be addressed to Jefferson Grimes, Deputy Director, Government and Public Affairs Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701. Comments also may be provided via e-mail at the following address: federal@dot.state.tx.us or sent via facsimile transmission to (512) 463-9389. The deadline for receipt of comments is 5:00 p.m., November 15, 2009. These instructions will also be available on the department's website:

http://www.txdot.gov/public_involvement/public_comment/legislative_input.htm.

The department will not respond individually to comments received pursuant to this notice, however, it may contact individuals to verify or seek clarification of their comments.

TRD-200904061
Bob Jackson
General Counsel
Texas Department of Transportation
Filed: September 16, 2009

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University of North Texas

Invitation for Consultants to Provide Offers of Consulting Services

Pursuant to the provisions of Texas Government Code, Chapter 2254, the University of North Texas (UNT) extends this invitation (Invitation) to qualified and experienced consultants interested in providing the consulting services described in this Invitation to the University of North Texas.

Scope of Work:

The selected consulting firm will be responsible for assisting UNT in evaluating, assessing and recommending of the pathway to accreditation of a joint PharmD program at UNT. The consultant must be or must have been a dean in a School of Pharmacy in a research university with experience necessary to provide the pathway to the accreditation of a joint PharmD program. The consultant must be able to provide a timeline and budget and be able to evaluate the following: (1) Faculty expertise needed and administrative needs; (2) Space requirements, including laboratory space; (3) Library resources needed; (4) Potential funding for research in pharmacy; (5) Assessment of pre-pharmacy programs and expectations for entering students; (6) Clinical placement of opportunities in Denton and Dallas for students; (7) Clinical appointments for faculty in hospitals or elsewhere; (8) Initial costs as well as ongoing costs; (9) Potential of partnerships with HSC; (10) Size of classes to achieve maximum benefit.

Specifications:

Any consultant submitting an offer in response to this Invitation must provide the following: (1) the consultant's legal name, including type of entity (individual, partnership, corporation, etc.) and address; (2) background information regarding the consultant, including the number of years in business and the number of employees; (3) information regarding the qualifications, education, and experience of the team members proposed to conduct the requested services; (4) the hourly rate to be charged for each team member providing services; (5) the earliest date by which the consultant could begin providing the services; (6) a list of five client references, including any complex institutions or systems of higher education for which the consultant has provided similar consulting services; (7) a statement of the consultant's approach to

providing the services described in the Scope of Work section of this Invitation, any unique benefits the consultant offers UNT, and any other information the consultant desires UNT to consider in connection with the consultant's offer; (8) information to assist UNT in assessing the consultant's demonstrated competence and experience providing consulting services similar to the services requested in this Invitation; (9) information to assist UNT in assessing the consultant's experience performing the requested services for other complex institutions or systems of higher education; (10) information to assist UNT in assessing whether the consultant will have any conflicts of interest in performing the requested services; (11) information to assist UNT in assessing the overall cost to UNT for the requested services to be performed; and (12) information to assist UNT in assessing the consultant's capability and financial resources to perform the requested services.

Selection Process:

The consulting services sought herein do not relate to services previously provided to UNT. UNT intends to award the contract for the consulting services to Dr. Rosalie Sagraves due to her credentials and experience in the pathway to the accreditation of a joint PharmD program.

Selection of the Successful Offer (defined below) submitted in response to this Invitation by the Submittal Deadline (defined below) will be made using the competitive process described below. After the opening of the offers and upon completion of the initial review and evaluation of the offers submitted, selected consultants may be invited to participate in oral presentations. The selection of the Successful Offer may be made by UNT on the basis of the offers initially submitted, without discussion, clarification or modification. In the alternative, selection of the Successful Offer may be made by UNT on the basis of negotiation with any of the consultants. At UNT's sole option and discretion, it may discuss and negotiate all elements of the offers submitted by selected consultants within a specified competitive range. For purposes of negotiation, a competitive range of acceptable or potentially acceptable offers may be established comprising the highest rated offers. UNT will provide each consultant within the competitive range with an equal opportunity for discussion and revision of its offer. UNT will not disclose any information derived from the offers submitted by competing consultants in conducting such discussions. Further action on offers not included within the competitive range will be deferred pending the selection of the Successful Offer, however UNT reserves the right to include additional offers in the competitive range if deemed to be in its best interest. After the submission of offers but before final selection of the Successful Offer is made, UNT may permit a consultant to revise its offer in order to obtain the consultant's best final offer. UNT is not bound to accept the lowest priced offer if that offer is not in its best interest, as determined by UNT. UNT reserves the right to: (a) enter into agreements or other contractual arrangements for all or any portion of the Scope of Work set forth in this Invitation with one or more consultants; (b) reject any and all offers and re-solicit offers; or (c) reject any and all offers and temporarily or permanently abandon this procurement, if deemed to be in the best interest of UNT.

Criteria for Selection:

The successful offer (Successful Offer) must be submitted in response to this Invitation by the Submittal Deadline will be the offer that is the most advantageous to UNT in UNT's sole discretion. Offers will be evaluated by University of North Texas and member institution personnel. The evaluation of offers and the selection of the Successful Offer will be based on the information provided to UNT by the consultant in response to the Specifications section of this Invitation. Consideration may also be given to any additional information and comments if such information or comments increase the benefits to UNT. The successful consultant will be required to enter into a contract acceptable to UNT.

Consultant's Acceptance of Process:

Submission of an offer by a consultant indicates: (1) the consultant's acceptance of the Selection Process, the Criteria for Selection, and all other requirements and specifications set forth in this Invitation; and (2) the consultant's recognition that some subjective judgments must be made by UNT during this Invitation process.

Finding by President:

The President of the University of North Texas finds that the consulting services are necessary because the University of North Texas does not have the specialized experience or the staff resources to achieve these objectives. The University of North Texas believes that such expert consulting services will be cost effective, as they will ensure that the evaluation, assessment and recommendations of the accreditation for a School of Pharmacy are thoughtfully set forth in an efficient and effective manner from inception.

Submittal Deadline:

To respond to this Invitation, the response to the invitation should be in clear and concise written format and sent to: Carrie Stoeckert, Assistant Director, University of North Texas, 2310 North Interstate 35-E, Denton, Texas 76205. Offers must be submitted in an envelope or other appropriate container and the name and return address of the consultant must be clearly visible. All offers must be received at the above address no later than 3:00 p.m., CST, Friday, October 23, 2009 (Submittal Deadline). Submissions received after the Submittal Deadline will not be considered.

Questions:

Questions concerning this Invitation should be directed to: Carrie Stoeckert, Assistant Director, carries@unt.edu. UNT may in its sole discretion respond in writing to questions concerning this Invitation. Only UNT's responses made by formal written addenda to this Invitation shall be binding. Oral or other written interpretations or clarifications shall be without legal effect.

TRD-200903985
Carrie Stoeckert
Assistant Director
University of North Texas
Filed: September 10, 2009

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Public Notice - Award of Major Consulting Contract

Description of Activities Consultant Will Conduct:

The selected consulting firm will be responsible for assisting UNT in evaluating and analyzing UNT's alumni database to determine the effectiveness of the current application utilized by the Division of Advancement; evaluate the effectiveness of the PeopleSoft Contributor Relations application and provide a cost/benefit analysis of converting to a different application to include a recommendation of new solution; evaluate the effectiveness of the processes between the functional and technical units in regards to effectiveness of data extraction, application modifications, and customized reporting features and provide recommendations for improving the project management system utilized by Advancement Services and CITC; evaluate the health of the data currently in the alumni database and make recommendations for maximizing data quality and lowest expense and identify weaknesses in current data-mining capabilities.

Name and Business Address of Consultant:

T. Handler Consulting

4551 Ches Mar Drive

Eagan, MN 55123

Total Value and Beginning and Ending Dates of Contract:

Value: $55,250.00

Beginning Date: August 19, 2008

Ending Date: Shall remain in effect until the completion, approval, and acceptance of all services; and the delivery of final payment to T. Handler Consulting. Estimated timeframe of 5 weeks.

Dates on which Documents, Films, Recordings, or Reports that Consultant is required to present are due:

Date: Finalized report due in the 5th week of the project.

TRD-200903979
Carrie Stoeckert
Assistant Director
University of North Texas
Filed: September 10, 2009

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Texas Water Development Board

Applications Received for September 2009

Pursuant to the Texas Water Code, §6.195, the Texas Water Development Board provides notice of the following applications received by the Board:

City of Alice, 500 E. Main St., Alice, Texas 78332, received 7/22/09 for financial assistance in the amount of $6,940,000 under the American Recovery and Reinvestment Act of 2009 through the Clean Water State Revolving Fund.

City of Ingram, P.O. Box 379, Hunt, Texas 78024, received 7/22/09 for financial assistance in the amount of $1,150,000 under the American Recovery and Reinvestment Act of 2009 through the Clean Water State Revolving Fund.

City of Lake Worth, 3805 Adam Grubb, Lake Worth, Texas 76135, received 7/22/09 for financial assistance in the amount of $410,000 under the American Recovery and Reinvestment Act of 2009 through the Clean Water State Revolving Fund.

City of Rosenberg, 2110 Fourth St., P.O. Box 32, Rosenberg, Texas 77471, received 7/22/09 for financial assistance in the amount of $925,000 under the American Recovery and Reinvestment Act of 2009 through the Clean Water State Revolving Fund.

TRD-200904039
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Filed: September 14, 2009

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 33 (2008) is cited
as follows: 33 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "33 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 33 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).